TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~202~~ 41.

CATHERINE SCHLEMMER, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JUNE 7, 1905.

(19,794.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 292.

CATHERINE SCHLEMMER, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 In the Supreme Court of Pennsylvania in and for the Western District.

COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny, sct:*

Among the records and proceedings of the Supreme Court of Pennsylvania, in and for the Western District, the following may be found as matter of file and of record at No. — Oct. Term, 18—, to wit:

2 Among the records and proceedings enrolled in the Court of Common Pleas in and for the County of Jefferson in the Commonwealth of Pennsylvania, to No. 194 April Term, 1901, is contained the following,—

Copy of Continuance Docket Entry.

194.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Summons in Trespass. Issued March 20, 1901. Ret. to next Term March 26, 1901, Served the within Summons on the within named Defendant Company by giving to L. C. McGaw, Agent of the within named Company at Punxsutawney, Jefferson County, Pennsylvania, a true and attested copy and by making known to him the contents thereof. May 17, 1901, Plaintiff's statement filed. May 17, 1901, Rule on the Defendant to plead within 15 days or judgment *sec. reg.* issued. May 18, 1901, served the within rule personally on the within named Defendant Company by giving to C. Z. Gordon, Attorney of said Company a true and attested

3 copy of the same at his office in the borough of Brookville, Jefferson County, Pennsylvania, and by making known to him the contents thereof. May 18, 1901, Defendant's Plea of "Not Guilty" filed. T. L. Nov. Term, 1901, Octo. 25, 1901, Compulsory Rule to choose Arbitrators on the part of the Defendant on Nov. 20, 1901, at 10 o'clock, A. M. issued. November 20, 1901, Samuel States, Chas. S. Irvin and H. W. Mundorff chosen Arbitrators who are to meet at the Court House December 10, 1901, at 9 o'clock A. M. Same day Rule to arbitrators issued. Decr. 9, 1901, Agreement of counsel to strike off Rule of Reference filed. Nov. 22, 1901, served Rule to Arbitrate on Defendant by giving a true and attested copy of same to her Att'y Jeff G. Wingert, Esq., &c., Same day served personally on H. W. Mundorff, Nov. 23, 1901, served same personally on Samuel States and Chas. S. Irvin. T. L. April Term, 1902. April 29, 1902, Jury called and sworn. Same day motion for Compulsory non-suit granted by the Court, with leave to plaintiff to make motion to take same off within four days, By

the Court. May 2, 1902, Motion to take off compulsory non-suit filed. July 22, 1902, Opinion of Court filed and motion to take off the compulsory non-suit heretofore granted is refused. Frank F. Thomas, President Judge 30th Jud. Dist. Specially presiding. Jan'y 19, 1903, Certiorari from Supreme Court filed and notice of filing served on C. Z. Gordon, Att'y for Defendant. Jan'y 24, 1903, Notes of testimony filed. Sept. 15, 1903, Exception and Bill sealed on motion to set aside non-suit by Hon. Frank J. Thomas, P. J. 30 Judicial Dist. Specially presiding filed.

4 In the Court of Common Pleas of Jefferson County, April Term 1901.

No. —.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Cyrus H. Blood, Esq., Prothonotary of said Court.

SIR: Issue summons in an action of trespass, returnable *sec. reg.*

JEFF G. WINGERT,
Attorney for Plaintiff.

March 20th, 1901.

No. 194 April Term, 1901. Catherine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Præcipe for Summons in Trespass. Filed March 20, 1901. Wingert.

5 STATE OF PENNSYLVANIA, *Jefferson County, ss:*

The Commonwealth of Pennsylvania to the Sheriff of said County, Greeting:

We command you that you summon The Buffalo, Rochester and Pittsburgh Railway Company, so that it be and appear before our court of Common Pleas to be held at Brookville in and for said county, on the Second Monday of April next, to answer Catharine Schlemmer in a plea of Trespass Damages claimed and have you then and there this writ.

Witness the Hon. John W. Reed, President Judge of our said Court at Brookville, the 20th day of March in the year of our Lord, 1901.

CYRUS H. BLOOD,
Prothonotary.

6 No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo Rochester and Pittsburgh Railway Company. Summons. In Trespass. Jeff. G. Wingert Attorney.

March 21, 1901, Served the within summons on the within named defendant company by giving to L. C. McGaw, Agent of the within named company at Punxsutawney Jefferson County Pennsylvania by giving him a true and attested copy and by making known to him the contents thereof.

So ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff costs Chesnutt $5.53.

Sworn to and subscribed before me this 6 day of April 1901.

CYRUS H. BLOOD, *Pro.*

7 In the Court of Common Pleas of Jefferson County. No. — of April Term, 1901.

CATHERINE SCHLEMMER

v.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY (a Corporation).

Trespass.

Plaintiff's Statement.

JEFFERSON COUNTY, *ss:*

The plaintiff, Catharine Schlemmer, claims of the defendant, The Buffalo Rochester and Pittsburgh Railway Company, a corporation, the sum of Ten Thousand Dollars, which is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement:

The defendant was summoned to answer plaintiff of a plea of trespass and thereupon plaintiff by her attorneys J. G. Wingert and A. J. Truitt, complains of defendant, a corporation duly organized and doing business within the State of Pennsylvania—in the Counties of Jefferson and Clearfield among others—and having certain of its works, tracks, cars and other equipment in said Counties of Clearfield and Jefferson and carrying on certain of its purposes and operations in said Counties.

8 That Adam M. Schlemmer, husband of plaintiff, had been for sometime theretofore and was on the 5th day of August A. D. 1900 in the employ of defendant company, on said particular date acting in the capacity of flagman on one of defendant's freight trains. And while thus employed her said husband on said day, to wit, August 5th A. D. 1900, was killed by reason of defendant's negligence as will hereinafter appear and this action has been instituted to recover the damages therefor. Said damages for said injury resulting in the death of plaintiff's husband belonging to plaintiff as widow and to her two children Edwin E. Schlemmer, aged 4 years, and Charles C. Schlemmer, aged 3 years, they being all the children left by decedent thus entitled along with plaintiff.

Decedent was a careful, competent, willing and faithful employee of defendant company. And while engaged in the line of his duties and of his employment on said date, viz. August 5, 1900, in what is known as the Dubois yards of defendant company in the County of Clearfield aforesaid he lost his life by reason of defendant's carelessness as shown by the following facts and circumstances, viz.:—

Defendant had received and was transporting over its railroad and under its direction what is known as a shovel or shovel car or steam shovel car which is used in construction work. The
9 coupling of this shovel car was exceedingly complicated and dangerous. Decedent was not warned by plaintiff in any way or manner of this unusual and dangerous arrangement or appliance and darkness having come on went under this shovel car with his lantern burning brightly to make the coupling; the drawbar of the coupling of the shovel car was unusually large and heavy weighing some 80 pounds; decedent used good judgment, did his best, made use of his former knowledge of all ordinary contrivances of this kind but by reason of defendant's negligence and carelessness in not having instructed him in the manipulation of this dangerous coupling and in not having warned him in regard to the same the decedent failed in making the coupling and his head was caught between the steam shovel car and the end sill of the caboose to which he was trying to couple the shovel car and thus he was killed, dying in about one hour thereafter his head having been crushed as aforesaid. By reason of the darkness decedent could not observe many things which he otherwise might have had it been daylight. Said dangerous shovel car had no deadwoods it projected over the drawhead several feet and the drawhead itself was what is known as an old fashioned one not being a patent one and safe in any respect or of the latest and best appliance of its kind. Said coupler was not a legal coupler or coupling as required by existing laws on date — decedent's death viz. on August 5, A. D. 1900. Defendant was
10 transporting said shovel car from Limestone in the State of New York through the State of Pennsylvania.

Decedent at time of his decease was of the age of 31 years, in good health, able and strong and willing to work, received good wages.

Therefore plaintiff on account of defendant's negligence and carelessness as aforesaid in causing the death of her said husband has brought this action against defendant to recover said sum of Ten Thousand dollars being the pecuniary loss sustained by her and her said children by reason thereof.

JEFF G. WINGERT,
A. J. TRUITT,
Attorneys for Plaintiff.

No. — April Term, 1901. Com. Pleas Jeff. Co. Catherine Schlemmer *v.* The B. R. & P. Ry. Co. Plff's Statement. Filed May 17, 1901. J. G. Wingert, A. J. Truitt Att'ys.

11 In the Court of Common Pleas of Jefferson County. No. —. April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

To Cyrus H. Blood, Esq., Prothonotary of said Court.

SIR: Issue rule on defendant to plead in 15 days, or judgment *sec. reg.*

JEFF G. WINGERT,
A. J. TRUITT,
Attorneys for Plaintiff.

May 16th, 1901.

No. 194 April Term, 1901. Catherine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Præcipe for rule to plead. Filed May 17, 1901. Wingert, Truitt.

12 In the Court of Common Pleas of Jefferson County, April Term, A. D. 1901. No. 194.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

And now, to wit: May 17th 1901 at the instance of Jeff. G. Wingert and A. J. Truitt, Esqrs., Attorneys for the Plaintiff Rule on the defendant above-named to plead within 15 days or judgment will be entered *sec. reg.*

[SEAL.]

Certified from the Record.

CYRUS H. BLOOD,
Prothonotary.

Brookville, Pa., May 17th, 1901.

13 No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Rule on Defendant to plead. Truitt & Wingert.

May 18, 1901, Served the within Rule personally on the within named Defendant Co. by giving to C. Z. Gordon Attorney of said Company a true & attested copy of the same at his office in the Borough of Brookville, Jefferson County Pennsylvania & by making known to him the contents thereof.

So. ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff costs Chesnutt $2.24.

Sworn to and subscribed before me this 18" day of May 1901.

CYRUS H. BLOOD, *Pro'y.*

14 *Defendant's Plea.*

In the Court of Common Pleas of Jefferson County, of April Term, 1901.

No. 194.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

May 18th, 1901, the Defendant, by C. H. M'Cauley and C. Z. Gordon, its attorneys, pleads Not Guilty.

C. H. M'CAULEY,
C. Z. GORDON,
Att'ys for Defendant.

No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester & Pittsburgh Railway Co. Defendant's Plea. Filed May 18, 1901. M'Cauley, Gordon, Def't's Att'ys.

15 *Compulsory Rule of Reference.*

In the Court of Common Pleas of Jefferson County. No 194, April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

And now, to wit, on this 25th day of October, A. D. 1901, the defendant, by C. Z. Gordon, its attorney, comes into the office of the Prothonotary of the Court of Common Pleas of Jefferson County, Pa., and enters a rule of reference in the above cause, and states it to be the determination of the said defendant company to have arbitrators chosen on the 20th day of November, A. D. 1901, at ten o'clock in the forenoon of said day at the office of the Prothonotary of said Court, in the Borough of Brookville, in the County aforesaid, for the trial of all matters in variance between the parties in the above stated action, agreeably to the Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act Relating to Reference and Arbitration," passed the 16th day of June, A. D. 1836, and its supplements.

C. Z. GORDON,
Attorney for the Defendant.

16 No. 194 of April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester & Pittsburgh Railway Co. Compulsory Rule of Reference. Filed Octo. 25, 1901.

17 *Rule to Choose.*

JEFFERSON COUNTY, *ss:*

In the Common Pleas of Jefferson County. No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

And now, to wit, the 25" day of October 1901, the defendant files its determination to have all matters at variance between the parties submitted to arbitrators to be chosen at the Prothonotary's Office, in Brookville, on the 20" day of November next, at 10 o'clock A. M. of said day.

Extract from the record,

CYRUS H. BLOOD, *Prothonotary.*

And now, November 20, 1901, Plaintiff by Jeff G. Wingert, Esq., and C. C. Benscoter for Defendant met, and the Prothonotary fixed the number of Arbitrators at three and made choice of Samuel States, Chas. D. Irvin and H. W. Mundorff who are to meet at the
18 Court house on the 10" day of December 1901, at 9 o'clock A. M.

JEFF G. WINGERT,
Att'y for Pl't'ff,
C. Z. GORDON,
Per C. C. BENSCOTER,
Att'y for Def't.

No. 194 April Term, 1901. Catharine Schlemmer *versus* The Buffalo, Rochester and Pittsburgh Railway Co. Rule to Choose Arbitrators. Served on me Oct. 28" 1901. A. J. Truitt Att'y for Deff. Gordon.

19 *Rule to Arbitrate.*

JEFFERSON COUNTY, *ss:*

[SEAL.]

In the Court of Common Pleas of Jefferson County. No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY CO.

And now, to wit, Plaintiff and Defendant by Attorneys having met at the Prothonotary's Office, made choice of Samuel States,

Chas. S. Irvin and H. W. Mundorff to whom all matters at variance between the parties in this case are to be submitted, who are to meet at the Court House in the Borough of Brookville, on the 10th day of December, 1901, next at Nine (9) o'clock, A. M.

Extract from the record.

CYRUS H. BLOOD, *Prothonotary.*

20 No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Rule to Arbitrators.

Sworn to and subscribed before me this 31 day of December, 1901.

CYRUS H. BLOOD.

Nov. 22, 1901, Served the within Rule on the within named plaintiff Catharine Schlemmer by leaving a true and attested copy of same with her Atty. J. J. Wingert & by making known to said Atty the contents thereof. Also same day served same personally on the within named H. W. Mundorff by giving to him a true & attested copy and by making known to him the contents thereof.

Nov. 23 1901, Served same on Samuel States & Chas S. Irvin by leaving with an adult member of their families a true and attested copy of same & by making known to said adults the contents thereof.

So. ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff costs Chesnutt $13.20

21 In the Court of Common Pleas of Jefferson County, Pa.
No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

December 9th, 1901, it is hereby agreed between plaintiff and defendant in above stated case, by their respective attorneys, that the rule of reference heretofore taken out be stricken off without prejudice to the rights of either party.

A. J. TRUITT,
Attorney for the Plaintiff.
C. Z. GORDON,
Attorney for the Defendant.

No. 194 of April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Co. Agreement to strike off Rule of Reference. Filed Dec. 9, 1901.

22 In Comm. Pleas, Jeff. Co. No. 194, April Term, 1901.

CATH. SCHLEMMER
v.
B., R. & P. RY. CO.

Now, April 29, 1902, Defts. by its Attys moves for a non suit in the above case for the following reasons.

1. That there is no proof of any negligence on part of defendant in this cause.

2. That the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel—that this omission was the fault of the deceased exclusively—and that deceased was guilty of contributory negligence and there can be no recovery in this case.

3. That under all the evidence in this case their verdict must be for the defendant.

C. Z. GORDON,
C. H. M'CAULEY,
Att'ys for Deft.

23 No. 194, April Term, 1901.

April 29, 1902, Notice for Compulsory Non-suit granted with leave to the plaintiff to make a motion to take same off within four days.

BY THE COURT.

24 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
v.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

And now, May 2nd, 1902, the plaintiff, by her attorneys, A. J. Truitt and Jeff G. Wingert, moves the Court to take off the compulsory non-suit entered in above case for the following reasons, viz:

First. The Court erred in directing the Jury to render a verdict for the defendant.

Second. The Court erred in ruling as a matter of law that the plaintiff was not entitled to recover in this case.

Third. That the evidence showed that the decedent, Adam M. Schlemmer, was not negligent, and used all the care demanded by the circumstances.

Fourth. That under the United States Statutes specially pleaded in this case, that the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler.

25 Fifth. The evidence showed that the defendant company violated the law, and was, therefore, guilty of negligence and caused decedent's death.

Sixth. That the evidence showed that the coupling which the decedent attempted to make was complicated, difficult and dangerous, and defendant company had neglected to instruct decedent as well as inform him of the nature thereof.

Seventh. That the evidence disclosed that the car coupling in this case was out of date, more dangerous than the old link and pin coupling, and not a reasonably safe appliance.

Eighth. That the evidence showed that the decedent attempted to make coupling with lantern lighted, and that it was a question for the Jury to determine whether decedent used ordinary care.

Ninth. That the evidence of the experts showed that the shovel car in this case was the first car of this kind handled by them in many years of experience, that it had an unusual coupling, that it had no deadheads or bumpers thereon, and that the defendant company accepting such a car thus equipped was guilty of negligence *per se.*

A. J. TRUITT.
JEFF G. WINGERT.

26 No. 194 April Term, 1901. C. P. Jeff. Co. Catharine Schlemmer *v.* The Buffalo, Rochester and Pittsburgh Railway Company. Motion to take off Compulsory non-suit. Filed May 2, 1902.

27 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

Sur motion to take off compulsory non-suit.

Thomas, P. J. Specially presiding.

Opinion.

It is urged that we erred in granting this non-suit for two principal reasons)—That the evidence on the part of the plaintiff tended to show negligence on the part of defendant, free from any negligence on the part of decedent that contributed to the accident that caused his death, and that said evidence showed that defendant company had violated the United States statute, specially pleaded, with reference to the equipment of the car that caused decedent's death with the proper safety appliances by such statute provided for.

28 Ordinarily, a master is required to provide for his servants or employees, not perfect, or even the best of appliances, but such as are reasonably suitable for the purpose of carrying on

the business about which they are engaged. When this has been done, the employee assumes the risk of injury from such ordinary dangers as necessarily and usually accompany his employment and from any unusual dangers incident to said employment of which he had notice and voluntarily exposed himself thereto.

The evidence showed that plaintiff's decedent, who was shown to have been a competent man in the position of brakeman, which he occupied and in which he had had considerable experience, attempted to make a coupling, which was shown not to have been complicated or difficult to understand, and of which said decedent undoubtedly had a thorough knowledge and comprehension, between one of the defendant's cars and a steam shovel or construction car, which was being conveyed by defendant company, for some private parties, from a point in the State of New York to one in this Commonwealth; that plaintiff's decedent, who could evidently see and understand the said coupling as attached to the steam shovel, had his attention called thereto, and was directed as to his position in making use
29 thereof twice by the conductor of his own train and of the switching engine crew, and within a very few minutes of the accident; and that in making said coupling, decedent, contrary to the instruction, immediately prior thereto given, raised his head too much, and because of that, as well as because of the irregularity or unevenness of the heights of the respective car and steam shovel, and the absence of bumpers or deadwoods that would properly operate for the purpose of preventing that which actually happened, the decedent's head was crushed, resulting in his almost immediate death.

The plaintiff's statement declares that the coupling of the steam shovel was exceedingly complicated and dangerous, and that decedent was not warned of said unusual and dangerous applicance, and by reason thereof the accident happened which resulted in the death of decedent.

Plaintiff's testimony not only fails to sustain these charges but quite negatives them.

That the coupling arrangement was not complicated was made very apparent by the testimony; that decedent was warned as to the danger and directed as to the manner of operation was conclusively proven; and that he attempted the act of making the coupling with a full knowledge of the danger seems to be beyond contro-
30 versy. A citation of authorities is not necessary to show that the defendant company is not to be held for negligence because of the fact that it has undertaken to convey a steam shovel, equipped with a means of coupling which is not of the latest device, or even if it were dangerous, where the brakeman understood or was made aware of the difficulty or danger to be *gaurded* against; nor if the injury was caused by the fault of the employe in taking unnecessary risks, or in failing to heed warnings or instructions, especially when given by his superiors whose duty it is to do so; nor by voluntarily placing himself unnecessarily in a dangerous position whereby he is injured.

It is alleged that these rules are not applicable to the case at bar, or rather that the case at bar is removed therefrom by the act of Con-

gress, which went into effect a few days prior to this accident, and which prohibits all carriers from hauling or permitting to be hauled on their lines any car used in interstate traffic which is not equipped with the automatic coupler, the eighth section of which provides, "that any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk
31 thereby occasioned, although continuing in the employment of such common carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

It is urged that this steam shovel was not a "car used in interstate traffic," and therefore, the act of Congress is not applicable thereto.

Our attention has been called to the decision of the United States Circuit Court for the Southern District of Iowa, in the case of White *v.* Chicago Great Western Railway Company and referred to in the Fifteenth Annual Report of the Interstate Commerce Committee, p. 67, where in construing a statute quite similar, it was held that a locomotive tender was not a car within the meaning of the act.

In our opinion, this would be putting a stricter construction on the act than was intended by the law-making power, and possibly more strict than is literally warranted. But we are of opinion that this shovel car was not a car used in interstate commerce or any other kind of traffic. Such was not its purpose nor the use to which it was being put.

But even were the steam shovel, as shown to have been operated or transferred and equipped, construed to come under the provisions of said act, we are of opinion that plaintiff is not en-
32 titled to recover, for the reason that her own testimony adduced at the trial showed the decedent to be guilty of negligence that contributed to his death.

True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employé to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

We think the true position to be, that the employé is placed in the position that he would be, in case he were furnished with a defective appliance, which fact is known to his employer but not, either actually or constructively, to the employé. In such a case the employé has not assumed the said risk incident to his employment, and yet we trust it would not be seriously contended that such an employé might recover for an injury to which his own negligence had contributed.

It has been held that contributory negligence will bar a recovery for an injury inflicted by defendant's negligence which is the
33 result of a failure to comply with statutory requirements.

McRickard *v.* Flint, 114 N. Y. p. 222;

Grand *v.* Mich. and C. R. Co., 3 Mich. p. 564; and

Nugent *v.* Vanderveer, 38 Hun. p. 487, (same case on re-argument, 39 Hun. 322.

As persuasion of the correctness of this theory, we call attention to the fact that, early in this law's operation, the Interstate Commerce Commission, through its Secretary, addressed a letter (which is referred to in their Fourteenth Annual Report, p. 84), to the subordinate branches or various railway organizations calling attention to the provisions of said act and also gave it as the opinion of the Commission that section 8 of the act does not fully release them from responsibility for contributary negligence.

It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover.

And now, July 21, 1902, the motion to take off the com-
34 pulsory non-suit heretofore granted is refused.

FRANK J. THOMAS,
President Judge 30th Jud. Dist., Specially Presiding.

No. 194 April Term, 1901. Catherine Schlemmer *v.* The Buffalo, Rochester and Pittsburgh Railway Company. Opinion of Court *sur* motion to take off compulsory non-suit. Filed July 22, 1902.

35 In the Court of Common Pleas of Jefferson County. No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
v.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Plaintiff by her attorneys excepts to the refusal of the Court to set aside the non suit in this case, and at their request a bill of exceptions is sealed as of July 21 1902.

FRANK J. THOMAS, [SEAL.]
President Judge 30th Judicial District, Specially Presiding.

No. 194 of April Term, 1901. Catharine Schlemmer *vs.* The Buffalo Rochester and Pittsburgh Railway Co. Exception and Bill. Filed Sept. 15, 1903.

36 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Stenographer's Transcript.

Filed January 24, 1903.

BUELL B. WHITEHILL,
Official Stenographer.

37 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Stenographer's Transcript of Notes of Trial.

Tuesday, April 29th, 1902, this case came up for trial at a regular term of the Court of Common Pleas held in and for the County of Jefferson, at Brookville, Pa., before the Honorable Frank J. Thomas, Judge of the Thirtieth Judicial District of Pennsylvania, specially presiding.

There appeared on the part of the plaintiff A. J. Truitt, Esq. and Jefferson G. Wingert, Esq.; and on the part of the defendant company Levi G. McCauley, Esq., and Cadmus Z. Gordon, Esq.

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The following proceedings occurred:
Jury called and challenged in due form.
Jury sworn in the trial of the cause at 11 o'clock A. M.
The plaintiff opened her case to the jury by Jefferson G. Wingert, Esq.

39 Mr. HARRY COATES, called as a witness on the part of the plaintiff, was duly sworn.

Direct examination was conducted by Mr. TRUITT:

Q. Mr. Coates, what is your age?
A. 33.
Q. What is your occupation?
A. Yard conductor.
Q. What did you say?
A. Yard conductor.
Q. How long have you been in the railroad business, working on the railroad?

A. About 15 years.
Q. 13?
A. 15.
Q. 15 years. Mr. Coates, where was you on the evening of August 5th, 1900?
A. I was switching in the Du Bois yard.
Q. What was your employment at that time?
A. I was yard conductor.
Q. You was yard conductor there then?
40 A. Yes, sir.
Q. Did you know Adam Schlemmer?
A. I did.
Q. How long before that had you known him?
A. Oh, I had known him about four or five years.
Q. What was his business?
A. He was flagman at the time?
Q. At that time?
A. Yes, sir.
Q. What business had he, or occupation had he, for years before that?
A. Why, he had been a brakeman.
Q. He had been employed on a railroad?
A. Yes, sir.
Q. Well, now, tell the court and jury what took place on the evening of August 5th, 1900, from the very beginning of it, Mr. Coates.
A. Well, this train came in in the afternoon, and I switched the train and put it on the side track, for the train going south to take with them.
Q. That going south would be going towards Punxsutawney?
A. Towards Punxsutawney; yes, sir. And I pulled this train up, and this crew came in and got the train; a train with
41 seventeen cars, I think it was, and a steam-shovel.
Q. Where was this steam shovel?
A. It was on the rear end of the train.
Q. Mr. Coates, now describe that steam-shovel to the Court and jury; what was it?
A. Well, sir, it was a Martini steam-shovel.

By Mr. GORDON:

Q. What name?
A. A Martini steam shovel.

By Mr. TRUITT:

Q. And what was it used for?
A. It is used for construction work.
Q. For heavy shoveling in building a railroad; is that it?
A. Yes, sir.
Q. Now, how was it as to coupling on it; what kind of coupling had it on it?
A. It had a drawhead and a drawbar.
Q. Now this drawhead on that shovel car:—where was it?

A. It was right in under the box of the car.
Q. It was under the box of the car?
A. Yes, sir.
Q. That was the link the drawbar was fastened to?
42 A. The drawbar was in the drawhead.
Q. How far under the box of this car or shovel car was it fastened?
A. I should judge about two feet; between two and three, anyhow.
Q. Now, did the drawhead come out any farther than that, or was it back that far?
A. No; the drawhead did not come out at all. The drawbar was there to come out.
Q. And the drawhead was about two and one half feet from the end of the car?
A. Yes, sir.
Q. The draw bar,—where did it stay?
A. The drawbar stayed right in the drawhead. It was long enough to run out to make a coupling.
Q. How long, about, was it?
A. The drawbar was about three feet long, I should judge.
Q. And it would project past the end of that shovel car about how far?
A. About a foot.
Q. What was the size of that drawbar, Mr. Coates?
A. Well, I suppose it would weigh in the neighborhood
43 of 75 or 80 pounds, anyhow.
Q. When it was not in use or coupled or anything, where was it?
A. Just hanging down in the drawhead.
Q. How far down did it drop?
A. Oh, probably it would be about two feet from the ground.
Q. Now, where it was used to couple with on the other end of it,—what kind of an end had it there?
A. Indeed I did not pay particular attention to the other end of the car at all.
Q. Did it have a hole in it?

By Mr. GORDON: He is speaking of the other end of the drawbar.

A. I thought you were speaking of the other end of the car. It had a hole through the bar for a pin to be dropped in it.
Q. Then the way to couple to another car was to drop a pin through that hole? Is that it?
A. Yes, sir; you would have to raise, and know the other coupling
Q. Mr. Coates, what kind of a coupling was that? Was it a safe coupling or a dangerous coupling, or what was it?
A. It would just be according to how a man would go
44 at to make the coupling.
Q. How?
A. It would just be according to how a man would go at to make the coupling. It would be dangerous in one way, and in another way it would not.

Q. Would you say as good as a safety coupler?
A. Oh, no; no, sir.

By Mr. GORDON: We object to that, and ask that it be stricken out.

By the COURT: They do not have to furnish the best appliances. They may furnish something that is reasonably safe.

By Mr. TRUITT: We will come to this question that under the United States Statute they are required to furnish a safety coupler.

By the COURT: I think it is not a question of comparison with a safety coupler.

Q. Well, was it a safe coupler?
45 A. No; it was not just exactly a safe coupling.
Q. Wasn't it, Mr. Coates, a very dangerous coupling?
A. Well, it was just according, I say, as how a man would go to make the coupling. I have made many such couplings myself, and I have seen a good many.
Q. Well, what would you say if used after dark? How would you put it?
A. Well, after dark I would find what kind of a coupling I had to make. I would not go into it there to make that coupling unless the train was stopped, and would shove the caboose onto the train.
Q. If a man did not know what kind of a coupling it was, would it be a safe coupling to make after night?

By Mr. GORDON: Objected to by the defendant as leading.

By the COURT: There is no evidence to show that he made the coupling after night.

By Mr. TRUITT: We will follow this by evidence showing that the coupling was made after night.

46 By the COURT: Objection sustained.

Q. Mr. Coates, after that train was brought up there, will you just tell us about bring- it up and making this coupling. Tell us about that.
A. About him pulling the train out?
Q. Yes, sir.
A. He came in and got hold of his train and pulled it out onto the main track from No. 1 track. He had his caboose standing on the main track, and when he went to back down to the caboose the conductor stood on one side of the caboose and the flagman on the other. The conductor had a lamp; and I would not say the flagman had a lamp with him, for it was not dark yet. But anyhow, these seventeen cars and engine being quite a ways away from the caboose, this man had his lantern, and stepped out and gave a signal to stop, when this flagman went to make the coupling. I was there, and I seen he was too high. I seen what kind of a coupling it would be in that shape, and I told him to keep down.

By Mr. GORDON:

Q. You told Mr. Schlemmer to keep down?
47 A. I told Mr. Schlemmer to keep down. He had got down, but raised his head up, and I hollowed again. And I

seen he was going to get pinched, and I turned my head away; and as soon as the cars parted enough to get through, I got through between the cars and the caboose and helped pick the man up.

By Mr. TRUITT:

Q. Well, what was wrong with the man?
A. The top of his head was crushed.
Q. Sir?
A. It crushed the top of his head. He had raised his head too high.
Q. What crushed the top of his head?
A. The end of the caboose and the steam shovel plow.
Q. Were there any dead-heads on the end of the caboose?
A. Yes, sir; there were on the caboose.
Q. Was there on the shovel car?
A. No, sir; not on the shovel car.
Q. Describe the coupling on the caboose.
A. It was a patent coupling that was on the caboose.
Q. That is, one of this kind that goes around and catches?
A. Yes, sir.

Q. Now, to couple this car, this shovel car, to this caboose
48 that night, just explain what had to be done?

A. To couple the car he would have had to come up very slow and kept down under the car in order to make the coupling; or stop the car and shove the caboose up again it.
Q. Describe the coupling right there.
A. He would have had to have lifted this drawbar up to the patent coupler, and then dropped his pin through the drawbar.
Q. He would drop it through the patent coupler and the drawbar,—the pin,—and that would couple it?
A. Yes, sir.
Q. About what size, now, was that hole or place that he had to put this in?
A. Well, there was lots of room there for the drawbar link.
Q. About what size was that place or hole that the end of the drawbar there had to be attached to the patent coupler?
A. Oh, I could not say.
Q. About an inch or two high, was it?
A. Yes, sir, about that.
Q. And about two or three inches wide?
A. Yes, sir.
Q. And the drawbar would take up about that whole space, wouldn't it?

49 A. Just about that space; yes, sir.

Q. After that what did you do? What caused this accident? What happened when he went to couple there?
A. Well, he got his head too high.
Q. Well, did he make the coupling?
A. No, he didn't make the coupling. He missed it.
Q. He missed it?
A. Yes, sir.

Q. How did he miss it?

A. When he raised the drawbar up in that drawhead to the patent coupler the drawbar slipped by the drawhead.

Q. And the caboose and the end of the shovel car came together?

A. Came together; yes, sir.

Q. Wasn't that a very dangerous end on that shovel car?

Objected to by the defendant.

By Mr. TRUITT: He says he has been in that work for seventeen years.

By the COURT: It is very leading, to say the least. It is quite a leading question.

50 By Mr. TRUITT: I only ask it in this way: that he has had experience for fifteen years; and whether or not the end of that car, without dead-woods on it, was a dangerous car or not.

Q. Answer from your experience in the railroad business of fifteen years.

A. Well, I have often seen cars a good bit that way, that a man had to keep down in under a car in order to make a coupling. I have often run across big cars that way that had bumpers on them, that were broken off in that same way. A man has to watch that, you know.

Q. Are you satisfied with your answer to that question?

A. Why, yes.

Q. You are. You say you do not know whether he had any lantern or not?

A. I do not know whether he had his lantern with him or not.

Q. You testified before the Coroner in this case?

A. How is that?

Q. You testified before the Coroner in this case?

A. Yes, sir.

Q. Now will you just refresh your memory whether you did not testify he had a lantern?

51 A. I say I cannot mind now whether he had his lantern or not, but I know the conductor had his lamp.

Q. What time in the day did this take place?

A. Why about eight o'clock, I think. Between eight and nine, or along there.

Q. I want to ask you whether you did not testify before the Coroner now that "I was at the crossing of the Buffalo, Rochester & Pittsburg Railway at Brady street, April 15th about 9:30 o'clock in the evening?"

By Mr. GORDON: Objected to as leading and as an attempt to contradict their own witness.

By Mr. TRUITT: This is to refresh his memory as to whether or not he did not say that.

By the COURT: Unless it appears the witness has disappointed you in his testimony, you have no right to contradict your own witness. If it should appear that he has deceived you and has testified to something other than what he is now testifying to you would have

52 such a right. But so far as the Court knows anything about it you have not been deceived by your witness in any respect.

Q. Who was there when this took place, Mr. Coates?

A. Well, there was some man that was with the steam shovel, was standing inside the door of the caboose; and the flagman; the conductor Neilson; and myself was standing right where the coupling was made.

Q. And was Mr. Meadows there?

A. Mr. Meadows came after the man had got pinched.

Q. Did Mr. Schlemmer die from this injury?

A. Yes, sir.

Q. How long afterward?

A. Well, I had my engine go down and come up the main track,—that would be about a quarter of a mile,—and get hold of the caboose, and we put the man in it; and by the time we got to the station he was dead.

Q. This caboose,—what did it depend on now to keep apart from another car?

A. It had bumpers on it.

Q. It depended then on the drawhead; is that it?

A. No, sir. Bumpers; there is bumpers on cars, you know.

Q. Do you call them dead-woods?

53 A. Yes, sir; those are called deadwoods.

Q. And do you say that this caboose had dead-woods on it?

A. Yes, sir.

Q. And did not depend on the drawheads to keep it from another car?

A. Why you know all cars have dead-woods on them, anyhow. Very nearly all of them. You do not find very many without them.

Q. Well, now, will you explain to the court and jury the difference of keeping cars apart with dead-woods and with the drawheads?

A. Well, if the drawhead would break, of course the deadwoods would be there to keep the cars apart.

Q. And if the dead-woods were not there, what would happen then?

A. They would be right together, of course.

Q. Had this caboose deadwoods on it?

A. It had the caboose dead-woods on it. Yes, sir; I think it had. Most of them had.

Q. I am asking whether you know?

A. I would not say for sure now whether it had or not.

Q. Didn't you testify at that very Coroner's inquest that it had not?

54 A. That it had not?

Q. Yes, sir; that it had none?

A. Indeed if I recollect.

Cross-examined by Mr. GORDON:

X Q. How long had Mr. Schlemmer been acting as a brakeman?

A. Indeed if I know just how long. I had known him there for three or four years anyhow on the Buffalo, Rochester & Pittsburg.

X Q. And he had been acting as a brakeman during that whole time?

A. He had been flagging for quite a while. I do not know just how many years he had flagged.

X Q. As I understand he first became a brakeman, and then after being brakeman awhile he was promoted to flagman?

A. To flagman; yes, sir.

X Q. Then he was a brakeman with experience, was he?

A. Yes sir.

X Q. About what was his age?

A. Why I suppose he was about 35, or along there.

X Q. This steam shovel you speak of is a mere machine used in excavating?

A. Yes, sir.

X Q. A machine on wheels; it is not a car at all, as I un-
55 derstand it. It was merely a machine used in excavating, on wheels. Is that right, Mr. Coates?

A. Yes, sir, that is right.

X Q. And it was equipped with a single-pocket drawhead, was it?

A. Yes, sir.

X Q. That was about the commonest coupler known prior to the introduction of the automatic, wasn't it?

A. Yes, sir.

X Q. And it is very simple, isn't it?

A. Yes, sir, it is.

X Q. And in order to couple the drawbar to this drawhead all that was necessary was to lift out the coupling pin, insert the end of the drawbar into the pocket, and drop the pin in?

A. You would have to raise the draw-bar——

X Q. I mean in coupling the drawbar to the steam shovel?

A. The drawbar stayed right in the drawhead, you know.

X Q. It was already coupled to the steam shovel?

A. Yes, sir.

X Q. And that is all that was necessary to do in order to couple to the steam shovel?

A. That was all; yes, sir.

56 X Q. Did it require any instructions to tell Mr. Schlemmer how to make this coupling; that is, did he know how to make the coupling?

A. He knows how to make a coupling, I guess.

X Q. That is, he has had enough experience to know.

A. Yes, sir; he has had experience enough to know.

X Q. All that was necessary to make the coupling to the caboose was to guide the free end of the drawbar into the slot in the knuckle?

A. Yes sir.

X Q. And Mr. Neilson had set the pin for him?

A. Yes, sir, he had set the pin.

X Q. And there was nothing complicated about it?

A. No.

X Q. The only danger that there was was that that would occur if he lifted his head too high?

A. Yes sir.

X Q. You say you notified him twice to keep down?

A. Yes sir.

X Q. Did he obey that word?

A. He got down once, and then he got his head up too high again; and I hollowed at him, and it was too late.

57 X Q. If he had obeyed your instructions, Mr. Coates, this accident could not have happened could it?

A. No, I do not suppose it would; it could not.

X Q. How far away from him were you at the time you notified him?

A. He was on one side of the caboose and I was right on the other side .

X Q. About six or eight or nine feet away?

A. About seven or eight feet, any how.

X Q. When you called to him, directing him to keep down the first time, what reply if any did he make?

A. He did not say anything at all.

X Q. But he did stoop, did he?

A. Yes.

X Q. And the second time you say you called to him to keep down?

A. Yes, but it was too late then.

X Q. Have you seen many steam shovels in your time, Mr. Coates?

A. Why no; not a great many. I have saw a few, though.

X Q. They were all equipped with this same drawhead?

A. They were all equipped about the same way.

X Q. And were all equipped with the coupling bar or drawhead?

A. Yes, sir.

58 Redirect examination by Mr. TRUITT:

R. D. Mr. Coates, how many steam-shovels did you ever see Mr. Schlemmer, the decedent, handle?

A. That was the only one.

R. Q. You say now and testify that this was the simplest form of coupler outside of the automatic coupler?

A. No. The old-fashioned drawheads is what I understood him, is the way they all used to be. The old style drawheads, you know.

R. Q. And that was coupled with a pin and link, wasn't it?

A. Yes, sir was coupled——

R. Q. And would not that be much simpler and safer than this kind of a coupler?

A. He was talking about the drawhead, I understand.

R. Q. How did a man couple with the link and pin coupler?

A. With a short link.

R. Q. Didn't he stand at the side?

A. He could not do it that way.

R. Q. Used a stick?

A. No, sir; because that was dangerous.

R. Q. Was not the orders of the railway company that he had to use a stick?

59 A. Yes, sir; you had to sign for a stick.

R. Q. And agree to make it that way?

A. If people wanted to make it that way.
R. Q. It was one of the rules, wasn't it?
A. Yes, sir.
R. Q. And you could stand away outside and couple that link and not be in any danger at all. Is that true?
A. No.
R. Q. Do you say that this shovel car, and this coupler, weighing 75 to 80 pounds, that a man had to get under, was a safer coupler that that old link and pin?
A. There was not a great deal of difference in it.
R. Q. Coul- you have made this coupling with a stick?
A. No, sir; you could not. The pin was too heavy.
R. Q. You could not have obeyed the rules of the company and made it with the stick?
A. No, sir; you could not with the stick.
R. Q. How many wheels were on that shovel car; what kind of a running gear had it down there?
A. Very small wheels; I could not just exactly say what size they were; regular ordinary wheels, however.
R. Q. The trucks. How many wheels and trucks, now, had it, if you can recollect?
60 A. It had two sets of trucks: a truck under the back part, and a truck under the front part.
R. Q. Just the same as another truck?
A. Just the same.

Recross-examination by Mr. GORDON:

X Q. You railroad men call a drawbar a link very often, don't you, Mr. Coates?
A. Why some people calls it a drawbar, and some people calls it a link.
X Q. And couple it then exactly the same way?
A. Just the same way.
X Q. Two men with a stick extending through between the cars could have lifted that bar up, and inserted the pin?
A. Yes, sir, they could.
X Q. And you say there was a rule of the road requiring men to do that?
A. Yes, sir.
X Q. Schlemmer knew that?
A. Yes, sir; they all knew it.
X Q. And they all disobey it too, pretty generally?
A. You hardly ever see anybody with a stick.

61 Redirect examination by Mr. TRUITT:

R. Q. There was a rule that all the men should receive a stick?
A. Yes, sir.
R. Q. A stick long enough to go through from one car,—or across the cars, and two men to take hold of it?
A. No; it was not made that long.

R. Q. Tell us, so we can get it on the notes. How long was it?
A. About three feet long.
R. Q. You do not mean to testify they got a stick ten or twelve feet long, for two men to take hold of to lift it up?
A. No, sir; I mean about three feet.

Recross-examined by Mr. GORDON:

X Q. It was very easy to get a stick that long and do that, if they had wanted to?
A. Yes, sir.

Mr. D. E. GENSANER, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. What is your name?
62 A. Dorsey.
Q. Gensaner. What is your age?
A. About 31.
Q. What is your occupation?
A. Brakeman.
Q. On a railroad?
A. Yes, sir.
Q. How long have you followed railroading?
A. Well I think in the neighborhood of 15 years. I do not know just exactly.
Q. Did you know Adam Schlemmer?
A. Yes, sir.
Q. How long did you know him before his death?
A. Well, possibly ten years.
Q. Had you worked with him?
A. Yes, sir.
Q. Where?
A. I work- with Adam Schlemmer on the Pennsylvania & North Western Road, and I worked with him on the Buffalo, Rochester & Pittsburg.
Q. Now, how was he as to being a competent man in his position?
A. I always considered him a competent man.
A. And as to being a careful man.
63 A. Yes, sir, a very careful man.
Q. And as to his being a sober man and industrious?
A. That part of it I do not know very much about him.
Q. Well, I want to know whether he was a man who got full, and drank at his work and all that?
A. I never saw him drink any at his work.
Q. Mr. Gensaner, where was you on the evening of this accident, August 5th, 1900?
A. Do you want to know what position I was on the train?
Q. Yes, sir; when this took place.
A. I was near the head end of the train; just about one car from the engine, I believe.

Q. Now, what was the first you knew of it; just tell us?

A. The first that I knew of it was the gentleman that was in charge of the steam-shovel came up and said that it was too bad about that man getting killed. I and the engineer and fireman was standing there wondering what was the trouble up at the rear end. I asked him what man, and he said the flagman. Then I started back.

Q. What did you see when you got back there?

A. I did not see anything. The yard engine in the meantime had come up and taken the caboose with Mr. Schlemmer back to the depot.

64 Q. Did you see him afterwards?

A. I saw him in the caboose down at the depot.

Q. Did you see him after he was dead?

A. I did.

Q. Do you know what killed him?

A. They told me that he was caught between the caboose and the body of the steam-shovel.

Q. Mr. Gensaner, what kind of a coupling had the steam-shovel on?

A. It had a drawbar coupling.

Q. Where was the drawhead?

A. I am speaking now of the end next the caboose. Is that the one you mean?

Q. That is the one I mean.

A. It had a draw bar coupling, and it had a short cast drawhead back under the body of the car.

Q. How far back was that drawhead?

A. I presume it was about two feet.

Q. How long was the drawbar that made the coupling?

A. I do not know. I did not measure it, but I presume it was between three and four feet long.

Q. How much would it weigh?

A. Possibly 80 pounds.

Q. When it was not in use what became of it? Where did it stay when it was not used, now? Do you remember?

A. Oh, it hung down there. I did not notice the position

65 it hung in, but it hung down some.

Q. When you wanted to make a coupling with it what was necessary? What had you to do?

A. Well, you had simply to raise it up and enter it into the drawhead of the next car or caboose that you were coupling on.

Q. Would you say it weighed about 80 pounds? How high would you have to lift it?

A. Well in this case I do not know just exactly how high you would have to lift it.

Q. Several inches?

A. Possibly a foot.

Q. How would that be done to make that coupling, now?

A. Well, a man would have to catch hold of it and raise it up to the position of the other drawhead.

Q. Where would he have to get to?
A. He would have to get between the cars, the steam shovel car and the caboose, or else get down under.
Q. How are you to make these couplings under the rules of the company? How were you to make the couplings?

By Mr. GORDON: Objected to by the defendant, in that the proper way to show the rules of the company would be by produc-
66 ing the written rules.
By the COURT: If they were written rules they could be proved in another way.

Q. When you went in the employ of the company did they give you any instructions about making couplings?
A. Yes, sir.
Q. What were they?

By Mr. GORDON:

Q. In writing or otherwise?
A. They were in writing.

By Mr. TRUITT:

Q. Have you them with you?
A. Yes, sir; you have them in your possession.
Q. Have you them now?
A. I do not have them with me. I have them in my possession. Any one that signs the agreement has them in his possession.
Q. And what did they give you? A stick?
A. Oh, yes; you sign for a stick.
Q. Could this coupling have been made with this stick?
67 A. Well, I do not think it could have been. I do not think that a man would have strength enough to use the stick.
Q. What kind of a coupling was attached to the caboose?
A. It was a patent coupler. A Trudgeon drawhead, I believe.
Q. To fasten the end of this drawbar to that caboose and make this coupling what was necessary;—what had to be done?
A. It had to be raised up and entered into the drawhead of the caboose.
Q. And the pin——
A. And the pin dropped down through.
Q. The end of the drawbar next the caboose had a hole in it; was that it?
A. Yes, sir.
Q. Mr. Gensaner, how many of these shovel cars in your fifteen years of experience, have you had any knowledge of or handled?
A. I do not know. If I remember right this is the only one that ever I handled or helped to handle.
Q. What would you say as to the coupling on this now, in your fifteen years of experience as a railroader, what would you say as to this being a safe arrangement?

By Mr. GORDON: Objected to by the defendant, in that the witness has not qualified himself.

68 By the COURT: I think he may answer that question. He is a brakeman, and has served on the railroad.

Q. This steam shovel car coupling now; what would you say as to it being a safe arrangement?

By Mr. GORDON:

Q. The coupling apparatus on the car alone.
A. Without the bar?

By Mr. TRUITT:

Q. And the bar, and the way it was coupled, and all that.
A. I may say that was not as safe as it might have been.
Q. How was it now, as compared with the old style of link and pin?
A. Well any one knows in the railroad business that they would not claim that was as safe as a link and pin coupler.
Q. Had that shovel-car any deadwoods on the end of it?
A. No, sir.
Q. Had the caboose?
A. No, sir; no deadwoods.

Q. Now what would keep the shovel car and the caboose
69 from banging together, coming together?

A. This drawhead, if they were coupled, would.
Q. But when this man,—this man missed the coupling, didn't he?
A. I did not see. I could not say.
Q. Well, I believe the testimony here is that he did miss it. Now when he missed it, Mr. Gensaner, from your knowledge and what you saw there of that coupling on the shovel car and the coupling on the caboose, what would take place?
A. I do not understand the question.
Q. Would the two cars come together?
A. If the coupling was missed?
Q. If the coupling was missed?
A. Yes, sir.
Q. They would come together?
A. Yes, sir.
Q. If there were deadwoods in there would they?
A. Possibly they would have. I think if there had been deadwoods on it, because the body of the shovel car was higher than the drawheads.
Q. The body of the shovel car was higher than the caboose; how much higher? Now that the court and jury may understand that, you mean the bottoms of them; the under part of the caboose
70 and the under part of that shovel car,—the under part of the shovel car was much higher than the under part of the caboose? Is that right?
A. The under part of the shovel car was higher than the drawhead on the caboose.

Q. Than the drawhead on the caboose. And the drawhead on the caboose would run under the shovel car?
A. Yes, sir.
Q. And that would permit the two cars to come together?
A. Yes, sir.
Q. What time in the day did this accident take place?
A. About 8:55.
Q. Of what year?
A. I believe 1900.

Court adjourned until 2 o'clock P. M.

Afternoon Session, 2 o'clock P. M.

Examination of D. E. GENSANER resumed by Mr. TRUITT:

Q. Do you know whether Mr. Adam Schlemmer had a lantern that evening or not; do you know whether Mr. Schlemmer had a lantern that evening or not?
71 A. I do not know. I did not see.
Q. Will you explain to us how the coupling was made; what was done?
A. Well, I did not see the coupling made, you know.
Q. Well, what I mean is, where was the caboose, and where was the train, and what was done?
A. Well, the caboose was cut off on the main track from the engine; and we backed in on No. 1 siding in the Du Bois yard, and pulled the train out, and backed into the caboose and he made the attempt to make the coupling.
Q. Was the caboose standing on the main track?
A. Yes, sir.
Q. And then you brought these seventeen cars, with the shovel car on the end, up against it to couple?
A. Yes, sir.
Q. Now was the caboose toward Du Bois or Falls Creek, or down toward Punxsutawney?
A. Well the caboose after we pulled down on the main track, the caboose was on the north end of the train, or toward Falls Creek or Du Bois.
Q. And where were you going to take this train to?
A. We were bringing it to Punxsutawney.
Q. Now, did you tell us what position you had on this
72 crew?
A. I was head brakeman on that crew at this time.
Q. What road at that time was you working on?
A. I was working for the Buffalo, Rochester & Pittsburgh Railroad Company.
Q. Where does it run?
A. Well, my understanding is that it runs or did run from Punxsutawney to Buffalo and Rochester.
Q. Is it in this county, any of it?
A. Yes, sir.

Q. And Clearfield County?

A. I think that there is part of it in Clearfield, if I am not mistaken.

Cross-examined by Mr. GORDON:

X Q. How long had Mr. Schlemmer been engaged in braking, to your knowledge, Mr. Gensaner?

A. Mr. Schlemmer was employed there before I went on the road. I can tell you that.

X Q. Well, to your knowledge how long?

A. Well, I do not know how long.

X Q. Four or five years?

A. No, not as a brakeman; no, sir.

X Q. As brakeman and flagman then together?

A. Well, possibly four or five years.

73 X Q. He was continuously employed as brakeman or flagman during that period?

A. I believe so.

X Q. What were the stages of promotion; they begin you as brakeman first, and then as head brakeman?

A. Yes, sir.

X Q. And then you worked at that a couple of years?

A Yes, sir.

X Q. Then you become middle brakeman?

A. Yes, sir; that is the way it works now.

X Q. Then end brakeman or rear brakeman?

A. No; after you brake head, then you go to brake in the middle awhile, and then as your term comes up for brakeman you get promoted from the middle to flagman.

X Q. Then Mr. Schlemmer was in the position of a flagman?

A. Yes, sir.

X Q. And a competent brakeman was he?

A. Yes, sir.

X Q. This coupling apparatus on the steam shovel consisted merely of a solid single pocket drawbar or drawhead, did it?

A. That is the part that the drawbar went into?

X Q. This is on the steam shovel?

A. Yes, sir.

74 X Q. That is, the drawbar was fastened in with a pin?

A. Yes, sir.

X Q. That is the simplest form of coupling known, isn't it?

A. The simplest in that case.

X Q. All that was necessary in order to couple to the automatic coupler on the caboose was to lift up the end of the drawbar and insert it into the slot in the knuckle of the automatic coupler?

A. Yes, sir.

X Q. And the pin was inserted before the coupling was attempted, wasn't it?

A. I believe so. I do not know about that, however.

X Q. You do not know as to that. Any brakeman would understand how to do that, wouldn't he, Mr. Gensaner?

A. Any man would understand it; yes, sir.
X Q. It didn't require any instructions to tell him how to do it?
A. No, I do not think he needed any instructions whatever.
X Q. The only thing then in order to avoid accident, was to keep down when you raised the drawbar; to keep your head down?
A. Yes, sir; he had to get down under.
X Q. And if you kept your head down there was no danger of injury, was there?
A. If you kept your head down and made the coupling
75 there *there* was no danger.
X Q. Did you notice how the train was backed up against the caboose; whether gently or otherwise?
A. Very gently.
X Q. Did it move the caboose?
A. I cannot say.
X Q. There was no shock, or anything of that kind?
A. I do not know; I was on the head end of the train.
X Q. But you did notice it was done gently?
A. It was done as gently as I know how it could be done.
X Q. You have, I believe, stated if there had been deadwoods on the caboose it could not have prevented this accident?
A. I do not know whether I said it that way or not.
X Q. Well, how is that?
A. I do not remember just how I did answer that question before.
X Q. Well it don't matter. I do not want to take any advantage of you, Mr. Gensaner. If there had been at that time they would not——
A. I think if there had been deadwoods on there it would not have prevented the accident.
X Q. Is it usual to have deadwoods on cabooses?
A. Not usual. I never saw any on a caboose. Not on that particular caboose, anyway.
76 X Q. Is it usual to have them on any ceboose?
A. Not of late years it has not been. Not since the patent arrangement has been in vogue.
X Q. This drawbar or link and pin coupling was the old style coupling, which was in use before the automatic couplers came in?
A. The old link and pin coupler was the old style; yes, sir.
X Q. And drawbars were often used too, formerly, were they not?
A. Well, it was very frequently they were used.
X Q. You have used them yourself on the engine?
A. I do not know as I ever did.
X Q. You have seen them used, though?
A. I have seen them used.
X Q. Who coupled this shovel car to the caboose after this accident?
A. I do not know that.
X Q. You know it was coupled on, do you?
A. I know it was coupled on.
X Q. Do you know who owned this car or machine?
A. I no not know that.

X Q. Do you know whether it belonged to the railroad company?
A. I do not know that.

77 Mrs. CHRISTINA FASCETT, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mrs. Fascett, where did you live on the 5th of August, 1900?
A. I was living right at Brady street; right at the railroad crossing.
Q. In what town?
A. Du Bois.
Q. Are you engaged in business there?
A. I have a little store there; yes, sir.
Q. Now will you tell the court and jury what you know of this accident; what you saw, or heard and saw.
A. Yes, sir. I saw the train standing out there, and I went back and served some cream; and while I was in I heard the cars come together, and the unnatural bump, as I thought, and I went to the door, and went clear out onto the road; and when I got out there the caboose and this steam shovel just give way, and I saw the man fall. And then I went back into the house, and said to this gentleman who was eating cream that there was a man killed. And I went out again, and when I went out the second time I went
78 clear to the track, and there was a brakeman or one of the men sitting on his knees, had him, and the blood just rushing from his head.
Q. Now, Mrs. Fascett, what time in the day was this?
A. As near as I could say, about 9 o'clock is what I think it was.
Q. Do you know whether the man who was killed had a lantern or not?
A. Well, I didn't see his lantern lit, but I saw his lantern laying on the track after the caboose pulled away.
Q. Where was it?
A. Where was the lantern?
Q. Yes.
A. Right in the middle of the track They picked it up.
Q. It was not light then?
A. No, sir.
Q. Did you hear any conversation among those railroad men about the accident at that time?

By Mr. GORDON: Objected to as hearsay, and hence incompetent.
By the COURT: We will allow her to say whether she heard it or not.

79 Q. In reference to this coupling?
A. Of course I heard the railroad men talking about that time, but I did not understand much about the steam shovel back there. I did hear the railroad men, to be sure, say it was not safe.

By Mr. GORDON: We ask that that be stricken out.

Q. The men who had charge of this train?

A. I could not say that. The men that was around there.
Q. Did you know any of these trainmen?
A. No, I was not acquainted with Mr. Schlemmer.

By Mr. TRUITT: If we do not connect it up, we are willing it shall be ruled out.

By the COURT: We will reserve it, then.

Q. Did you know any of the crew of this train?
A. No, sir; I do not think I was acquainted with any of them at that time. Oh, Mr. Neilson, yes, sir, the conductor. I knew Mr. Neilson.
Q. Was Neilson present?
A. Yes, sir, he was.
80 Q. Well did you hear him say anything?
A. No, sir, I did not.
Q. And you do not know whether any of the men were talking to him of this crew?
A. No; no.

Cross-examined by Mr. GORDON:

X Q. You spoke, Mrs. Fascett, of seeing, I think you used the expression the shovel car and the caboose fall apart. That is, you meant you saw them draw away from each other?
A. Yes, sir; when I got out as far as the road they just give way, and then I saw the man drop.
X Q. That was the slack of the train being taken up?
A. Oh, no, it was when the bump of the train let loose again, and then he fell.
X Q. After it had come together?
A. Yes, sir.
X Q. A foot or two or more?
A. I could not tell you. I went back again into the house.

By Mr. GORDON: We think that expression should be expunged from the record.
81 By the COURT: Yes, the answer of the witness as to hearing some of the men say it was not safe is stricken out; and the jury will take no cognizance of that in the case.

Mr. ISAAC HOOVER, called as witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Hoover, what is your age?
A. 25.
Q. 35.
A. 25.
Q. How old are you?
A. 25 this October 29th.
Q. Mr. Hoover, where was you on the 5th of August, 1900?
A. Du Bois.

Q. What was your occupation?
A. I was working as a contractor, a brick contractor at that time.
82 Q. Had you at any time before that been employed on the railroad?
A. Yes, sir.
Q. How long before that had you quit working on the railroad?
A. About six months, I believe, if I mind right.
Q. What railroad had you worked on?
A. The Rochester and Pittsburgh.
Q. How long?
A. About, between a year and a half and two years; something like that.
Q. Did you know Adam Schlemmer?
A. I knew him when I saw him; yes. I never was personally acquainted with him.
Q. On the 5th of August, 1900, do you know anything about this accident that took place there? Now just explain what you saw there?
A. I noticed this steam shovel, as you call it. They got it to take through to Punxsutawney. I think that is where it was going
Q. You were sitting on your porch?
A. Yes, sir.
Q. Was that on Brady street?
A. Yes, sir.
Q. Is that where this accident took place?
A. Yes, sir; on Brady street crossing.
83 Q. And you saw them going and getting the steam shovel?
A. Yes, sir; they came up and got it at the crossing, and went down and got the train.
Q. Did you say on the end of the train?
A. On the rear end.
Q. And they brought it up to couple to the caboose?
A. Yes, sir.
Q. You saw that, did you?
A. Yes, sir.
Q. Who did the coupling on; what did you see?
A. Mr. Neilson was the man, I believe, who set the pin; and this man Schlemmer stood by the caboose with this drawbar to make the coupling.
Q. You saw that?
A. Of course when they came together I could not see that, because I was on the opposite side.
Q. Do you know whether he had a lantern or not?
A. I think he had.
Q. Had he it lit?
A. I think he had. If I remember right he had it lit. I know Neilson had.
Q. Did you notice this coupling before they made it?
84 A. Yes, sir, I did. That is, as it went up.
Q. You noticed it as it went up?

A. Yes, sir.

Q. Did you make any remark about it at the time that you now recall?

By Mr. GORDON: Objected to by the defendant.

By the COURT: Not what the remark was. What he saw would be competent.

Q. For two years you say you have had experience as a railroader?

A. Not quite. Near about that.

Q. And during that time did you have experience with coupling cars?

A. Yes, sir.

Q. Was that what you worked at?

A. Switching; yes, sir.

Q. Made numerous couplings during that time?

A. Yes, sir.

Q. Did you notice the coupling on this shovel car?

85 A. Well yes; I noticed the drawbar.

Q. Can you explain what kind of a coupling it was?

A. A solid drawbar; what they called a solid drawbar. A cast iron drawbar is what I always called it.

Q. And the drawbar was under the car?

A. Under the car, yes, sir.

Q. And the drawbar extended out?

A. Yes, sir.

Q. Now, how was it as to being a safe appliance for coupling cars?

A. Well, I do not think it was very safe. I could not say it was. It never looked that way to me.

Q. How was it in comparison with that link and pin?

A. Well, it was far different from the old link and pin,—the drawbar that is there. It was made in the same style, only it was heavier and unhandier.

Q. How much would it weigh?

A. Well I would not know. Probably somewhere in the neighborhood of 80 pounds. I think that is what that one would weigh.

Q. And in case a man making that coupling should miss it and not make it, was there anything there to break it on the end of that car?

86 A. No, sir; nothing to keep them from coming together.

Q. What would you say from your experience as to its being dangerous or not?

A. Well, I certainly would have to say it was a dangerous coupling to make.

Q. And in comparing it with the automatic coupler, with the latest automatic coupler,—what would you say?

A. There is certainly a big lot of difference between that——

Q. With the automatic coupler you can stand on the outside of the car?

A. Yes, sir.

By Mr. GORDON: Objected to as leading and as incompetent and irrelevant.

By the COURT: It is leading.

Q. I will ask it this way. Mr. Hoover, will you explain to the court and jury how this automatic coupler, how it is coupled? How is that coupling made?

A. Well, it is made when the cars come together in the knuckles here; they are bound to make the coupling.

87 Q. Just by the impact. Is that it?

A. Yes, sir.

Q. They will lock around each other. And how does a man have to be to make that coupling?

A. All he has to do is to open his knuckle and make the coupling.

Q. Stand outside of the coupling. Now explain the old pin and link coupling. Explain to the court how to make that.

A. You have to hold the link with your hand or stick, or whatever you have, and of course it is coupled with a link and pin.

Q. Well now, can you stand outside with your pin and guide that link in?

A. Oh, yes.

Q. And when it comes together drop that pin?

A. Well the pin is set, and they generally drop themselves.

Q. Now the only way to couple this was to get down under the car?

A. That is the only way I would know.

Q. And lift up that 80 pound drawbar and insert it in that little place in the automatic coupler, and then drop the pin down through the hold?

A. Yes, sir; certainly you would have to do that to couple

88 in order to couple.

Q. How as to it being at the time this accident occurred daylight or dark, or how was that, Mr. Hoover?

A. It was just getting dark. They could not see a signal any distance with the light. They had to have a lantern.

Q. And how was it as to being dark enough to require a lantern to make the coupling?

A. Well yes; I suppose it was. A person could see better with a lantern at that time.

Q. Do you know what became of Mr. Schlemmer after he was crushed there?

A. Yes, sir; they put him in the caboose and backed him down to the Y. M. C. A. or whatever they call it there.

Q. Did you see him afterward?

A. Yes, sir.

Q. Was he dead?

A. Yes, sir.

Cross-examined by Mr. GORDON:

X Q. Where were you sitting, Mr. Hoover?

A. On the porch.

X Q. How far from this steam shovel?

A. Well, I don't know exactly. Something between forty

89 and fifty feet; somewheres in that neighborhood.

X Q. How much?

A. Forty or fifty feet. I would not say for sure. I never measured it.

X Q. You could see from that distance at that time what kind of a coupling apparatus this shovel had?

A. Yes, sir, I could. It was right straight in front of where we was sitting, and where the caboose was cut off the coupling made.

X Q. And there was not any trouble to see the coupling apparatus if you had been right beside the car?

A. Oh, no. Certainly a person could have seen that; that is sure as to that.

X Q. Plenty of light by which to see?

A. Yes, sir.

X Q. And the coupling of the steam shovel was of the simplest kind wasn't it? Simply a solid drawhead with a drawbar attached to it.

A. Yes, that is what it was. A solid drawhead with a drawbar attached to it.

X Q. It required no instructions for a man who had had experience in braking to understand how to use it?

A. No; all there is about it is you have got to know that. Of course if a man misses it——

90 X Q. You can see at a glance how to use it and what the dangers are?

A. Oh, yes; certainly.

X Q. And it was necessary in order to avoid danger to keep down out of the shovel proper?

A. That is the only way to keep from getting smashed.

X Q. And if that was done there was no particular danger?

A. Not if you kept in under; not particularly. Not if they came back steady.

X Q. They came back very gently and steadily in this case, didn't they?

A. Yes, sir; they did.

X Q. You spoke of it being dangerous. It is always dangerous to go between cars to make a coupling, isn't it?

A. Oh, yes. That is, one of them solid couplings.

X Q. And with a link and pin it is equally dangerous if you get between the cars. That is, the danger consists in getting crushed between the cars; is that it?

A. Yes, sir; if you get between them, that is, between the bumpers——

X Q. That is the danger then?

A. That is the danger, sir.

91 Redirect examination by Mr. TRUITT:

R. Q. Mr. Hoover, now wasn't it something of a complicated arrangement there to fasten the end of that drawbar into that patent coupler?

A. Yes, sir.

R. Q. Now, will you explain your answer to the Court and jury why you answered that?

A. Well, it is harder to make that with that patent coupler than it would be with a straight coupler and a solid drawhead. I do not see why it would not be. A patent coupler is open at one side.

R. Q. And there was a very little slot there or place to put this drawbar in, wasn't there?

A. Yes, sir.

R. Q. Did you notice,—now you say there was no deadwoods on the shovel car. Were there any on the caboose?

A. No, sir.

R. Q. Now did you notice the height of these cars. What killed this man? Will you explain that. How was he killed?

A. Why he was caught between the end of this shovel that is built into the car, it looked like a car, a flat car, and between the caboose,—where he was caught. His head.

92 R. Q. Right between the two coming together?

A. Yes, sir; right where he was caught.

R. Q. If there had been bumpers on those cars, from your observation there, you say you saw them, if there had been deadwoods on these or bumpers could they have come together?

A. Oh, I do not know. In that case I think the shovel was built higher than the bumpers would have come on the caboose.

R. Q. It would have gone over?

A. I believe so.

Recross-examination by Mr. GORDON:

X Q. Mr. Hoover, in coupilng with a drawbar or a link and pin, the automatic coupler is a good deal more dangerous than the old fashioned drawhead, isn't it?

A. That is to couple; yes, sir.

X Q. To couple a draw bar or a link and pin to it?

A. I always thought so.

X Q. In other words, the automatic coupler is the meanest thing to make an unmatched coupling that ever was invented?

A. Yes; it is worse than a straight drawhead if you have got to couple with a link and pin.

X Q. That is a patent coupler such as was on the caboose.

—. ——.

93 Mr. JAMES COCHRAN, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Cochran, where do you live?

A. In Du Bois.

Q. Where was you living August 5th, 1900?

A. South Brady street.

Q. In Du Bois?

A. Yes, sir.

Q. Did you know Adam Schlemmer?

A. No, sir; I was not acquainted with him.

Q. Do you know anything about the accident that occurred there that evening?

A. If I know anything in particular about it, Mr. Hoover and I were sitting right alongside where he made the coupling, and Hoover spoke about it when they pulled the train down; he said there is an unhandy thing to couple; and he said, "We will watch him make the coupling." That is when he pulled up on the side track. And I noticed when they backed up. I said they gave him lots of time to couple; I do not think he will have any trouble; and they backed up to the caboose, and I seen he didn't
94 make the coupling; and Hoover said, "Somebody must have got pinched down there; and we started down, and of course there he was right alongside of the coupling.

Q. Did you notice whether he had his lantern with him or not?

A. I did not in particular. No, sir; I did not.

Q. You did not look in particular?

A. No sir; I did not.

Q. Was it growing dark at that time?

A. It was just getting dark.

Q. When you went down there did you see the man that got hurt?

A. Yes, sir; I did.

Cross-examined by Mr. GORDON:

X Q. How far away were you, Mr. Cochran.

A. Well, I should judge it was about thirty or forty feet; somewheres along there. Right across the track from where it was. Across the road.

X Q. There was still enough light there that you could*n't* see what was going on?

A. Yes, it was not really dark yet. You could see them.

X Q. The train came back very gently?

95 A. Yes, sir; it came back real nice. I made the expression when it came back.

X Q. There was no difficulty for a man standing right opposite the shovel from seeing all there was to be seen?

A. Why if he was real close there was not; no.

Mr. H. C. NEILSON, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Nielson, what is your age?

A. 30 years old.

Q. What is your business?

A. Freight conductor on the Buffalo, Rochester & Pittsburg.

Q. That is this defendant company, is it? How long have you been working, Mr. Nielson?

A. Ten years.

Q. On this particular road?

A. No, sir.

Q. How long on this line?
96 A. About seven years altogether.
Q. Did you know Adam Schlemmer?
A. Yes, sir.
Q. Was he in that crew?
A. Yes, sir.
Q. You had charge of him, had you, and of that crew?
A. Yes, sir.
Q. And that train. How long have you known Mr. Schlemmer before this accident?
A. About three or four years.
Q. What position had he in that train crew, Mr. Nielson?
A. Well sir, he was acting as brakeman that day.
Q. What took place now that evening when this accident occurred Just relate it from the beginning, Mr. Nielson?
A. Well, sir, we had instructions to take up this train, and take it to Punxsutawney. So we got the caboose and went up to Brady street crossing, and got the caboose off the main track and we were on the switch and got hold of the train and pulled it out.
Q. What was on the rear of your train?
A. The steam shovel.
Q. Will you describe that steam shovel to the court and jury.
A. Well, it was an ordinary steam shovel, is about all
97 I know about it.
Q. A truck under it?
A. Yes, sir.
Q. And was used for what purpose?
A. Used for contractors at the time.
Q. In making railroad?
A. Railroad building.
Q. To shovel dirt?
A. Yes, sir.
Q. A big shovel operated by steam?
A. Yes, sir.
Q. Well can you tell us how that is done? Did they build a truck for it to run on?
A. I could not say.
Q. You do not know how that is. Mr. Nielson, how many of them did you ever handle?
A. That is the only one I ever handled.
Q. In your ten years of experience. Mr. Nielson, explain now to us the coupling on that steam shovel?
A. Well sir, it was an ordinary casting and a drawbar, between three and four feet long, the drawbar; and this casting on the steam shovel was what we call of standard height, and it is set
98 kind of under the frame or body, or whatever they call it, of the car.
Q. On the end of it there?
A. Yes, sir.
Q. Now, do you remember what kind of a coupling was on the caboose?

A. Yes, sir.
Q. What kind was that?
A. A patent coupler.
Q. Now, what was necessary to make this coupling; to be done?
A. Well the only way to make it would be to set the pin into this drawbar, into the place where the pin goes through, and the pin would drop itself.
Q. And then backed the train to the caboose?
A. Yes, sir.
Q. And this drawhead had to be fastened, had it?
By Mr. GORDON: Drawbar.
Q. Drawbar had to be fastened in the patent coupler?
A. Yes, sir.
Q. And then you say the pin would drop?
A. Yes, sir.
99 Q. Now when it came to coupling this shovel car to the caboose tell us what took place that evening.
A. Well we backed down within about three or four feet of the caboose, and Mr. Schlemmer said that he would enter this drawbar in that and drop the pin, and I told him I would set the pin and it would drop itself. I went in and got the pin and set it, and I told him, when he went down under the car to take hold of this bar, to be sure and stay down low, so if he missed the coupling he would be in the clear so it would not catch him.
Q. Now, Mr. Nielson, why did you stay out there? Why didn't you go in there and drop that pin for him?
A. Well, sir, I was standing on the opposite side to give the signal to the engineer. It was not necessary to drop the pin. It would drop itself. And it was necessary to give the signal, so the engineer would know when he was back far enough.
Q. Was it a dangerous place to be in?
A. No, sir; not any more than making an ordinary coupling of that kind.
Q. Do you say it was not dangerous to go in there when there was no drawheads on those cars?
A. It is dangerous to make any coupling, more or less.
100 Q. Wasn't this more dangerous than ordinary couplings?
A. More than the patent coupler, yes, sir.
Q. And wasn't it more dangerous than the link and pin coupling, too?
A. I do not know that it was, any more than that a man had to get underneath there. If he stayed——
Q. Then you want to testify it was not more dangerous to make this coupling than the link and pin coupling?

By Mr. GORDON: We object to this method of examining the witness; I have no doubt the witness has testified to the truth, as well as the other witnesses; and why should there be leading questions asked, and why should these imperious questions be asked in a leading tone?
By the COURT: Unless the witness has in some way disappointed

you in the testimony he has given, and you have been led in that way to believe he would testify other than the way he has testified, you would not have the right to discredit him or cross-examine him. But if he has we will permit you so to do.

101 By Mr. TRUITT: He testified at the Coroner's Inquest in this case, and this was my reason for so proceeding.

By the COURT: If he is testifying differently now you have the right to know.

Q. Didn't you testify then, before the Coroner's Inquest that there would be no protection for a man in case he misses the coupling unless he got under the car?

A. Why I said he had to stay down in the clear.

Q. And didn't you state down at that Inquest that there was no bumpers there?

A. It was not my business.

Q. There were no bumpers?

By Mr. GORDON: We object to that question as leading.

By the COURT: You should not make a statement and ask the witness to confirm that statement.

By Mr. TRUITT: He has testified he has had ten years experience in making couplings.

102 By the COURT: They are not objecting to his competency for that purpose. But you are stating a fact, and asking him to agree with you. That is what they are objecting to.

Q. Was it dangerous to go in and set the pin and stay there?

A. I set the pin myself.

Q. Was it dangerous to go in and set that pin?

A. Was it?

Q. Was it dangerous to go in there and set that pin?

A. Why I set the pin standing on the platform myself.

Q. Was it dangerous to go in and set that pin?

By Mr. GORDON: We object to that. Nobody went in and set that pin.

By the COURT: There is no evidence that nobody went in and set that pin.

By Mr. TRUITT: He says he would not go in and set it, and stayed at the side.

103 A. I stood right on the platform and set it. It was not necessary to go between the cars at all.

Q. You got up on the caboose?

A. I set the pin when I got up on the caboose. I set it in the hole that is made for those pins.

Q. Didn't you testify Mr. Schlemmer wanted you to drop the pin after he inserted it?

A. He wanted me to drop it, and I told him I would set it so it would fall.

Q. Why didn't you do as he wanted you to?

A. I could not stay in there and give the signal at the same time?

Q. You would have got killed?

A. Probably if I had stood up there straight I might have.

Q. Mr. Neilson, I want you to state whether this was a dangerous coupling to make or not?

A. Well it would be more dangerous than a patent coupler.

Q. Would it be more dangerous than a link and pin coupling?

A. More dangerous than a link and pin coupling?

Q. Yes, sir.

A. Well, the difference would be a man would not have to stoop down in order to make the link and pin coupling, and he would to make one of this kind.

104 Q. Now making the link and pin coupling he would stand on the outside?

A. No, sir, he would have to stand on the inside between the cars, without he would use a stick, and then he would be partly between them.

Q. Then he could stand outside if he used a stick?

A. Partly.

Q. If the man had not used a stick and there had been a link and pin coupling there. Well you think he could have done that with a stick?

A. How is that?

Q. You say it could have been done with that stick?

A. Making a common link and pin coupling?

Q. To make this coupling. Could he have done that with that stick? What had he to do to make it?

A. Well, sir, the only thing he had to do was to get down and take this bar and enter it right into this patent coupler where it is provided there for a place to enter the bar, this drawbar.

Q. And that was a very small place in there, wasn't it?

A. About two inches, I suppose.

Q. Mr. Nielson, what time of day did this take place?

A. 8:55.

105 Q. Had you your lantern there?

A. Yes, sir.

Q. Was it lit?

A. Yes, sir.

Q. Was Mr. Schlemmer's lit?

A. I could not say whether his was lit or not. It more than likely would be.

Q. Had Mr. Schlemmer a lantern?

A. I could not swear that he did. It has been so long ago I don't remember.

Q. Did you see the accident take place?

A. Yes, sir.

Q. Did you see anything drop at the time it took place?

A. The only thing I saw drop was Mr. Schlemmer when the cars parted.

Q. Did you notice his lantern drop?

A. No, sir.

Q. Did this kill Mr. Schlemmer?

A. Yes, sir.

Q. He died?
A. Yes, sir.
Q. Where did this shovel car come from?
A. I don't remember where it came from. We was to take it from Du Bois to Punxsutawney.
106 Q. Sir?
A. I say I don't remember where the car came from.
Q. Where was it to go to?
A. We was to take it to Punxsutawney.
Q. Did you take it?
A. Yes, sir.
Q. When?
A. That day; that evening, rather.
Q. How was it now,—will you explain to us what the height of those two cars was, the shovel car and the caboose? Just explain how they were as to heights?
A. The heights of the cars or the heights of the drawheads?
Q. The height of the drawheads?
A. The drawheads was the standard height and this drawbar could be raised from 28 to 36 or 37 inches; raised or lowered.
Q. Do I understand you it hung down that far and had to be lifted up that far?
A. When it hung down it hung down so it was 27 or 28 inches from the ground.
Q. Well how far was it from the bottom of the car to which it was attached? How far down?
A. Did it drop down?

107 By the COURT:

Q. How much lower?
A. How much lower than the body?
Q. Yes, sir.
A. Five or six inches.
Q. What killed Mr. Schlemmer?
A. Getting his head mashed between the two cars, I suppose.
Q. What parts of the cars?
A. The body of the steam-shovel and the end of the caboose.
Q. Were the drawheads the same height on those cars off the ground?
A. Yes, sir.
Q. Would the caboose run under the shovel car?
A. Not that I know of.
Q. When they would come together, what was there to keep them apart, Mr. Nielson?
A. Well, there was this drawbar and this drawhead.
Q. If he missed the coupling, as he did, then what took place?
A. Well, it was owing to how this drawbar would be placed. If the drawbar was held up even with the drawhead, it would not come together. But in case it happened as it did, the drawbar not being raised up high enough, and got under the car, it would permit them to come together.

Q. And then they did come together?
108 A. Yes, sir.
Q. How about Mr. Schlemmer being an experienced railroad man?
A. From what I understand he had from four to six years experience. Something like that.
Q. How did you find him as to competency and carefulness?
A. He was a competent man.
Q. And careful?
A. So far as I know.
Q. Since refreshing your recollection, Mr. Neilson, what do you say now as to whether he had a lantern and whether it was lighted?
A. Well, sir, it has been so long since the time it happened, I could not say whether he had one or not.
Q. How was it as to darkness coming on?
A. Well, it was just getting dusk. It was not absolutely necessary to have a lamp, but we did. When we got the train ready I was going up to the head end to ride, the head end to the Stanley, and it would be dark when we got there; and that is the reason I had it.
Q. You calculated it would be dark from the time you got from the head end down to the other end of your train?
A. No, sir; I was going to ride the head end of the train from there to Stanley. We always get orders at Stanley, at the end
109 of the drouble track. It would be dark at Stanley, when we got there, and that is the reason I wanted a lamp.
Q. You could have lit the lantern when you got to Stanley?
A. The lamp was lit; it was not absolutely necessary to use the lamp. It was not that dark yet.
Q. Mr. Neilson, why was you moving this shovel car at that time or taking it to Punxsutawney?
A. Why it was a contractor's outfit. It was built down the line some place.
Q. You was a conductor, was you?
A. Yes, sir.
Q. And had a bill to take it?
A. Yes, sir.
Q. And what was the number of this train, Mr. Nielson?
A. We were 208.
Q. This caboose belonged to that train, did it?
A. No, sir; the caboose belonged to the Buffalo, Rochester & Pittsburgh Railway Company.
Q. Well, you was directed to take it along with you?
A. Yes, sir.
Q. And did take it?
A. Yes, sir.
110 Q. And the shovel car?
A. Yes, sir.

Cross-examined by Mr. GORDON:

X Q. Mr. Neilson, to whom did that shovel car belong?
A. It belonged to some contractor. I do not know who.

X Q. It was not owned by the Buffalo, Rochester & Pittsburgh Railway Company?
A. No, sir.
X Q. The coupling apparatus on the shovel car was the simplest kind known, wasn't it?
A. Yes, sir.
X Q. And such as was familiar to every brakeman?
A. Yes, sir.
X Q. There was nothing which required any instruction in making this coupling, except to keep down, was there?
A. That was all.
X Q. Mr. Schlemmer knew how to make it, did he?
A. Yes, sir.
X Q. You say that you warned him just before the coupling was made to keep down, to keep his head down, so if he missed the coupling he would miss the cars and not be pinched?
A. Yes, sir.
111 X Q. Had he regarded your instructions would he have been injured?
A. No, sir.
X Q. Then it was the disregard of the instruction given him by you that resulted in his death?
A. Yes, sir.
X Q. How did the train come up, Mr. Neilson?
A. It come back very easily.
X Q. Did it move the caboose at all?
A. No, sir.
X Q. Who made the coupling afterward on this steam shovel?
A. I did.
X Q. Did you have any difficulty with it?
A. No, sir.

Redirect examination by Mr. TRUITT:

R. Q. That was the first steam shovel car you had ever coupled, Mr. Neilson?
A. Yes, sir.
R. Q. And you gave instructions to Mr. Schlemmer how to do it?
A. Yes, sir.
R. Q. And in following your instructions he was killed? Is that so?

112 By Mr. GORDON: Oh, no.

R. Q. Didn't he try to follow out your instructions?
A. If he had followed the instructions he would not have been hurt.
R. Q. Didn't he try to follow out your instructions? Didn't he get down there on the ground?
A. Yes, sir.
R. Q. Didn't he have his lantern there?
A. I could not say whether he had his lantern or not.
R. Q. Didn't he hold up that big heavy bar there to the place?

A. He attempted to do it.
R. Q. And didn't he try to keep his head down, too?
A. I do not know whether he did or not. I suppose he did.
R. Q. What part of his head was crushed?
A. The upper part.
R. Q. His whole head was not crushed?
A. No, sir.
R. Q. Well, then, he certainly kept down part of his head?
A. Yes, sir.

Recross-examined by Mr. GORDON:

X Q. But it was the raising up in violation of your orders
113 that caused his death, wasn't it?
A. Yes, sir.

Mr. LEE E. MEADOWS, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Meadows, what is your age?
A. 29 years old.
Q. What is your occupation?
A. Braking and flagging.
Q. On what road?
A. The Buffalo, Rochester & Pittsburg.
Q. The defendant in this case,—the Buffalo, Rochester & Pittsburg Railway Company?
A. Yes, sir.
Q. Mr. Meadows, how long have you been employed on the railroad?
A. About twelve years since I started. I have not been
114 working all the time, though; with the exception of about two years and a half.
Q. Then you have been employed between nine and ten years?
A. Yes, sir.
Q. On the evening of August 5th, 1900, Where was you?
A. In Du Bois.
Q. Was you part of the crew of this train?
A. Yes, sir.
Q. What was your position?
A. Braking in the middle at that time?
Q. Did you know Adam Schlemmer?
A. Yes, sir
Q. What did you see of this accident?
A. We was ordered for eight o'clock that night, and we pulled up on the Main track at Brady street Crossing, and got the caboose, I think, and went in and pulled up this train of seventeen or eighteen cars,—seventeen cars and a steam-shovel. I think as well as I can remember I throwed the main track switch and got up between the first and second car over the caboose; that is the end of the steam shovel and one car from the caboose; and set up a couple of brakes,

to steady the train if it came back, and gave the signal. I knew we had a coupling to make, and wanted to go back steady.

115 Q. When did you first hear of the accident?

A. We backed up, I suppose, very close to the caboose. I did not feel any jar. They signed him down, and I stood and waited for the signal; and they gave a signal to back up, and I gave the signal, and then they gave the signal to move up; and then they slacked off, and one man standing on the car says, "My goodness, go back there; that flagman got killed?"

Q. What did you do?

A. I got down and went back.

Q. You went back?

A. Yes, sir.

Q. What did you see when you got back there?

A. He was lying out of the track, I suppose two or three feet from the track, when I got back there.

Q. What time of day was it?

A. Why it must have been 8:30 or 40. Somewhere thereabouts.

Q. Was it growing dark, Mr. Meadows?

A. Why it was not very dark, no.

Q. Did you know Adam Schlemmer?

A. Yes, sir.

Q. How long had you know- him?

A. I suppose eighteen or twenty months.

Q. You had worked with him, had you?

116 A. Yes, sir.

Q. Did you notice whether he had his lantern there that evening?

A. Whether he had his lantern?

Q. Lantern.

A. He had that lit up all right. I was at the rear end of the train with him. He had it lit up. I do not know whether he had it with him, but it was lit.

Q. When you went back to the rear he had his lantern?

A. I do not know whether he had it lit or not. It was on the caboose and he was on the caboose.

Q. How long was that before he was killed?

A. I suppose it was not over 15 or 20 minutes. He went and cut the cars off.

Q. Did you see the conductor, Mr. Nielson?

A. He was standing on the left hand side, giving the signal.

Q. Do you know whether he had a lantern or not?

A. Yes, sir; he had.

Q. Was it lighted?

A. Yes, sir.

Q. Were there any signals given there?

A. Any signals?

Q. Yes?

A. Yes, sir.

117 Q. Who gave them?

A. I could not say for sure, but I suppose it was the con-

ductor, Nielson. He was giving the signals, and Mr. Schlemmer was standing on the other side of the coupling.

Q. What was he signaling with?

A. With a lantern.

Q. Why was he signaling with a lighted lantern?

A. Why it was, as near as I can remember it was after sundown all right, and we usually lighted up our lamps at sundown as a usual thing.

Q. If it had been daylight that would not have been necessary would it?

A. No, sir.

Q. Mr. Meadows, did Mr. Schlemmer die as a result of this accident? Did you see him afterwards?

A. Yes, sir.

Q. After he was dead?

A. Yes, sir.

Q. What part of his head was crushed?

A. Why somewhere in there, about. In there (Indicating).

Q. The top part?

A. Yes, sir.

Q. Where was he taken to?

118 A. We took hom in the caboose, and ran the caboose down to the station, and took him from there up to the Y. M. C. A.

Q. You say you have been in that business about twelve years? About ten years?

A. It is about two and one half years——

Q. During that time how many of these steam shovel cars have you handled?

A. That is the first one, and I think we have only handled one since that that I can remember of.

Q. That was the first to that date?

A. Yes, sir.

Q. Mr. Meadows, did you notice the coupling on it?

A. Yes, sir.

Q. What kind of a coupling was it?

A. It was what I would call a solid drawhead, fastened underneath this platform that extended out over the drawhead.

Q. What was necessary to couple to the caboose that evening?

A. Well, the drawbar put into the drawhead.

Q. For a flagman to couple to the caboose what was required of him? What would he have to do?

A. What would he have to do?

Q. Yes, sir.

119 A. I suppose get down underneath the car. A man could not very well couple with a short stick.

Q. He would have to get down underneath the car, and get down on the ground, would he?

A. Yes, sir.

Q. And hold up this drawbar?

A. Yes, sir; and enter it into the drawhead of the caboose.

Q. Now, Mr. Meadows, what would you say whether that was dangerous or not?

A. Of course any of them is dangerous if you get caught in there.

Q. With the automatic coupler he does not have to get down in there, does he?

A. No, sir; he does not have to go in there at all.

Q. With a pin and link coupler how about it?

A. Why that is all right if you do not get in between the bumpers, and you are not liable to if you couple with a stick.

Q. This you could not couple with a stick?

A. You could not couple with a 24 inch stick.

Cross-examined by Mr. GORDON:

X Q. How did the train come back, Mr. Meadows?

120 A. Why it came back very steady.

X Q. Did it impact at all or didn't you notice that?

A. I could not tell. I was away the length of the steam-shovel car and another car. I heard them say it never moved the caboose at all.

X Q. It was moved gently?

A. As gently as he could move an engine.

X Q. Was it light enough for a man to see the coupling apparatus, and all about it?

A. Do you say was it light enough?

Q. Yes, sir; if he had been standing beside it?

By Mr. TRUITT: Or had been below, where he was.

A. A man could see very well if he was standing at the side. There is generally a big light there, anyway.

X Q. The coupling apparatus was one of the simplest couplings known, merely a solid drawhead with a solid drawbar attached to it?

A. Why as near as I could remember it was what I would call a solid drawhead bolted into the solid part of the steam-shovel.

X Q. It was a very simple arrangement, wasn't it?

121 A. Why yes, it was simple enough.

X Q. It didn't require any instructions to a brakeman to know how to handle it, did it?

A. Why a man would want to be very careful in making it to keep down.

X Q. Well, he would know how to handle the coupling, wouldn't he?

A. I suppose he would know if he went to couple the cars.

X Q. Well, you knew?

A. I would know how if I would go to make it.

X Q. Schlemmer knew how?

A. I suppose he did.

X Q. All that was necessary was to keep down, in order to avoid danger; is that right?

A. Yes, sir; if you keep down you are all right; and if it came back steady enough so he did not get run over.

X Q. Well, you did come back steady this time?

A. Yes, sir.
X Q. Any coupling that requires a person to go between the cars is dangerous, isn't it?
A. Yes, sir.
X Q. And that was what rendered this dangerous, principally, wasn't it?
A. Why yes; I understand that is the way he got killed,
122 coupling the car.
X Q. You do not know who owned this shovel car?
A. No; I do not know.

Redirect examination by Mr. TRUITT:

R. Q. Mr. Meadows, now would it be darker down under that car than on the outside around there?
A. Why not very much.
R. Q. But it was some darker?
A. Yes, sir; I should think it would be some darker.

Mr. JOHN C. MCCRAY, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. McCray, what is your business?
A. I am special agent for the Buffalo, Rochester & Pittsburg Railway Company.
Q. The defendant in this case?
A. Yes, sir.
123 Q. How long have you been acting as their special agent?
A. Fifteen years.
Q. Did you know about this shovel car that we have had this controversy about?
A. Why I investigated this *action*, but I never saw the steam-shovel car since the accident occurred.
Q. Where was it coming from Mr. McCray?
A. Why I learned from railroad men that it was coming from Limestone.
Q. In what state?
A. That is in the State of New York.
Q. And where was it going to?
A. Crenshaw, I think. This I know from hearsay.

By the COURT:

Q. Where?
A. Crenshaw, Pa. This I know from hearsay.

By Mr. TRUITT:

Q. From that investigation?
A. Yes, sir.
Q. What was it used for?
A. In the construction of railways.

Q. Who had it belonged to?
124 A. To the construction company; I think T. J. Bryant at the head of it.
Q. Will you just explain to the court and jury how it is used, Mr. McCray?
A. I do not know about that. I never had any experience with those shovels; and in fact I do not think I know anything about the shovel.
Q. You do not think that you could explain how it operates?
A. Well, I think you could prove that better by somebody else, because I never worked a day on a railroad in my life.
Q. You say it was being taken to Crenshaw?
A. Yes, sir.
Q. Where is that?
A. On the Pennsylvania & North Western.
Q. That was for construction work down there?
A. Yes, sir.
Q. Near Pittsburgh, in this state?
A. Yes, sir.

Cross-examined by Mr. GORDON:

X Q. Was it Glenshaw?
A. Crenshaw, I think.
125 Q. Crenshaw in Jefferson County, or was it Glenshaw?
A. Well, it was going down in near Pittsburg.
X Q. Well, it did not belong to the Buffalo, Rochester & Pittsburg Railway, did it?
A. No, sir.

Mrs. KATHERINE SCHLEMMER, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mrs. Schlemmer, what is your name?
A. Mrs. Kate Schlemmer.
Q. Mrs. Katherine Schlemmer?
A. Yes, sir.
Q. Where do you live?
A. Why I live with my father, between Winslow and Cloe.
Q. With your father between Winslow and Cloe?
A. Yes, sir.
Q. That is in this county?
A. Yes, sir.
126 Q. Was you ever married?
A. Yes, sir.
Q. Who to?
A. Adam Schlemmer.
Q. When?
A. Why the 6th of November I was married ten years. We was married ten years when he was killed on the 6th of November.

Q. You would have been married ten years if he had lived to the 6th of November?

A. We was married ten years when he was killed on the 6th of November.

Q. Did you ever have any children, Mrs. Schlemmer?

A. We had two.

Q. Two children?

A. Yes, sir.

Q. What was there names?

A. Edwin Earl and Charles Johnson.

Q. Edwin Earl and Charles Johnson Schlemmer.

A. Yes, sir.

Q. How old is the older?

A. Five years old.

Q. And the younger?

A. Four.

127 Q. Do you remember when they brought Mr. Schlemmer home?

A. Yes, sir.

Q. Was he dead?

A. Yes, sir.

Q. Did you bury him?

A. Yes, sir.

Q. Where?

A. Graffius' Cemetery.

Q. In this county?

A. Yes, sir.

Q. Mrs. Schlemmer, what was his business, his occupation, at the time he was killed?

A. Why it was flagman.

Q. On what railway?

A. The Buffalo, Rochester & Pittsburg.

Q. What were his wages?

A. Well, they averaged from $65, $70 and $80 a month.

Q. $65, $70 and $80 a month?

A. Yes, sir.

Q. What was his age, Mrs. Schlemmer, at the time he was killed?

A. Thirty one years.

Q. How was it as to his being a healthy man?

128 A. He was always a healthy man.

Q. As to working steadily, and all that; how was that?

A. He always was a good man to work.

Q. Are these your children here, Mrs. Schlemmer? (Indicating.)

A. Yes, sir.

Q. They are both living?

(No answer.)

No cross-examination.

Mr. J. A. SCOTT, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Scott, I want you to state whether you have had any experience as an insurance agent?
A. I have had some; yes, sir.
Q. In that have you had knowledge as to the actuary tables, or whatever it is called?
A. Yes, sir; the Experience Table; the Experience table of Mortality.
129 Q. Have you those with you?
A. I have some of these of the insurance company.
Q. What is the expectancy of life of a person 30 years of age?
A. Tables vary some. The ones I think most generally used are the Combined Experience Table of the insurance companies. What age?
Q. 31.
A. 33, 72 years.
Q. 33. 72 years.

By Mr. TRUITT: Plaintiff offers this in evidence.

No cross-examination.

Mr. JOHN C. MCCRAY, recalled as a witness on the part of the plaintiff.

Direct examination conducted by Mr. TRUITT:

Q. What is the business of this defendant company, Mr. McCray?
A. Well, they carry freight and passengers.
130 Q. Where — their lines extend from?
A. Rochester and Buffalo, in the State of New York, to Butler, in the State of Pennsylvania.
Q. How as to being through the Counties of Clearfield and Jefferson?

By Mr. GORDON: Oh, that is all right.

By Mr. TRUITT: Plaintiff offers especially in this case the Statute of the United States relating to safety couplers. It was approved March 2nd, 1893, by the 52nd Congress, second session, chapter 196; and appears in the United States revised statutes, or Statutes at Large, Volume 27, page 532. We plead this especially as part of the law in the case.

Plaintiff rests.

131 By Mr. GORDON: At the close of the plaintiff's case defendant moves for a compulsory non-suit, for the following reasons:

First: That there is no proof of any negligence on the part of the defendant in this cause.

Second: That the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to

keep his head at least as low as the floor of the steam-shovel. That this omission was the fault of the deceased exclusively; and that deceased was guilty of contributory negligence and there can be no recovery in this case.

Third: That under all the evidence in this case the verdict must be for the defendant.

By the COURT: The motion of the defendant for a compulsory non-suit is sustained, and a non-suit is entered; with leave to the plaintiff within four days to make a motion to take it off.

132 By the COURT: Gentlemen of the Jury: The case which you have been sworn to try has been disposed of by the Court. We deem that it is a question of law, which the Court must determine, and we have determined it by the action that we have taken, and you are therefore relieved from further action in this case.

FRANK J. THOMAS,
President Judge.

Stenographer's Certificate.

I hereby certify that, as Official Stenographer I attended the trial of the case of Catherine Schlemmer *v.* The Buffalo, Rochester & Pittsburg Railway Company, at No. 194, of April Term, 1901, and took full and accurate notes of the proceedings therein; and that the foregoing transcript, pages 1 to 79, inclusive, is a complete
133 and accurate transcript of the original notes of trial.

BUELL B. WHITEHILL,
Official Stenographer.

Brookville, Pa., Jan. 24th, 1903.

In the Court of Common Pleas of Jefferson County. No. 194 of April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Certificate.

The foregoing notes of the testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof, have been examined by me, and are hereby approved and ordered to be filed.

FRANK J. THOMAS,
President Judge 30th Judicial District, Specially Presiding.

134 *The Supreme Court Docket Entries.*

CATHERINE SCHLEMMER, Appellant,
vs.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Appeal from Common Pleas Jefferson Co. at No. 194 April Term, 1901. Appeal and Affidavit filed and Writ exit. Jan. 17, 1903
Sept. 28, 1903, Assignment of Error filed.
Oct. 10, 1903, Record filed.
Oct. 15, 1903, Argued.
Nov. 9, 1903, Judgment affirmed. *Per curiam.*
Nov. 19, 1903, Record remitted.
Mar. 13, 1905, Præcipe for Supplemental Writ filed.
Mar. 13, 1905, Writ, Sec. 18, Act 19, 1897, issued.

135 WESTERN DISTRICT OF PENNSYLVANIA, *County of Allegheny, ss:*

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. — for the County of Jefferson, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Catharine Schlemmer from the judgment of your said Court, at 194 of April Term, A. D. 1901, wherein Catharine Schlemmer, Appellant, is plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the second Monday of October, 1903, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the seventeenth day of January in the year of our Lord one thousand nine hundred and three.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON,
Prothonotary.

136 To the Honorable, the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

(Signed) JOHN W. REID, [L. S.]
Pres't Judge.

Notice of filing within writ served on me Jan'y 19, 1903.
(Signed) C. Z. GORDON,
Att'y for Appellee.

[Endorsed:] No. 194 April Term, 1901. No. 30 of October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Certiorari to the Court of Common Pleas No. — for the County of Jefferson Returnable the second Monday of October, A. D. 1903. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Geo. Pearson, Prothonotary. Filed January 19, 1903. Jenks & Corbet, A. J. Truitt J. G. Wingert, Attorneys for Appellant.

137 In the Supreme Court of Pennsylvania.

SCHLEMMER
vs.
BUFFALO, ETC., R. W. Co.

No. 30, October Term, 1903. Appeal C. P. Jefferson. Filed November 9, 1903.

Per *Curiam:*

Whether the Act of Congress of March 2, 1893, (27 U. S. Stat. at Large 531) in regard to the use of automatic couplings on cars employed in interstate commerce, has any applicability at all in actions for negligence in the courts of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the non-suit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject.

138 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, Sct:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company at No. 30 October Term, 1903, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 19th day of No-

vember in the year of our Lord One Thousand Nine Hundred and three.

[Seal of the Supreme Court Pennsylvania, 1776.]

GEO. PEARSON,
Prothonotary.

[Endorsed:] No. 30. October Term, 1903. Catharine Schlemmer, Appellant, *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Exemplification.

139 THE COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

To the judges of the court of common pleas No. — for the county of Jefferson, Greeting:

Whereas, By virtue of our Writ of Certiorari to No. 30 of October Term, 1903, of our Court, a record in the matter of the appeal of Catharine Schlemmer from the judgment of your said Court at No. 194 of April Term, 1901, wherein said Appellant is Plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant, was brought into our Supreme Court, and the said cause was there so proceeded in that on the 9th day of November A. D. 1903, the following decision was rendered, viz:

Judgment is affirmed *Per Curiam.*

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Supreme Court as aforesaid.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the nineteenth day of November in the year of our Lord one thousand nine hundred three.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON, *Prothonotary.*

140 [Endorsed:] No. 194 April Term, 1901. No. 30 October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, *vs.* The Buffalo, Rovhester and Pittsburgh Railway Company. Remittitur. Costs, attorney, $3.

141 WESTERN DISTRICT OF PENNSYLVANIA,
County of Allegheny, ss:

Supplemental Writ.

The Commonwealth of Pennsylvania to the judges of the court of common pleas No. — for the county of Jefferson, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Catharine Schlemmer from the judgment of your

said Court, at No. 194 of April Term, A. D. 1901, wherein said Appellant is Plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant.

The record in the above recited case being required by the Supreme Court for further proceedings therein, as provided by section 18 Act approved 19 May, 1897, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, Forthwith, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the thirteenth day of March in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON, *Prothonotary.*

142 [Endorsed:] Supplemental Writ. No. 30 of October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, vs. The Buffalo, Rochester and Pittsburgh Ry. Co. Certiorari to the Court of Common Pleas No. — for the County of Jefferson Returnable Forthwith Rule on the Appellee, to appear and plead on the Return day of the Writ. George Pearson, Prothonotary. Jenks & Corbet, J. G. Wingert, A. J. Truitt, Attorneys for Appellant.

To the Honorable, the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

—— ——. [L. S.]
—— ——. [L. S.]

143 *Certificate of Record.*

COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny, ss:*

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania, for the Western District thereof, Do Hereby Certify that the foregoing Record, pages 1 to 142 inclusive, is a true and faithful copy of the Record and Proceedings of the Supreme Court of Pennsylvania, in the Western District aforesaid, in a certain suit therein pending, wherein Catharine Schlemmer is appellant and The Buffalo, Rochester & Pittsburgh Ry. Co. is appellee.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for

the Western District, at Pittsburgh, this twenty-first day of March in the year of Lord one thousand nine hundred and five.

[Seal of the Supreme Court of Pennsylvania.]

GEO. PEARSON, *Prothonotary.*

144 I, James T. Mitchell, Chief Justice of The Supreme Court of Pennsylvania, Do Certify, that George Pearson was at the time of signing the annexed attestation and now is Prothonotary of the said The Supreme Court of Pennsylvania, in and for the Western District, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this twenty-first day of March in the year of our Lord one thousand nine hundred and five.

JAMES T. MITCHELL.

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania in and for the Western District, Do Certify, that the Honorable James T. Mitchell by whom the foregoing Certificate was made and given, was at the time of making and giving the same and is now Chief Justice of The Supreme Court of Pennsylvania; to whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this twenty-first day of March in the year of Lord one thousand nine hundred and five..

[Seal of the Supreme Court of Pennsylvania.]

GEO. PEARSON.

145 (Copy.)

In the Supreme Court of Pennsylvania in and for the Western District. At Law.

CATHERINE SCHLEMMER, Plaintiff,
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with her petition for a writ of error, makes the following assignment of errors, which she avers occurred upon trial of the cause, to wit:

I. The Court erred in refusing to set aside the non-suit in this case.

II. The Court erred in not submitting the question of contributory negligence to the jury.

III. The Court erred in holding that "The shovel car was not a car used in interstate commerce or any other kind of traffic."

IV. The Court erred in holding that "Plaintiff's decedent was guilty of negligence that contributed to his death."

V. The Court erred in holding that "Contributory negligence will bar a recovery for an injury inflicted by defendant's negligence which is the result of a failure to comply with statutory requirements."

A. J. TRUITT,
EDW. A. MOSELEY,
Attorneys for Plaintiff.

146 In the Supreme Court of Pennsylvania in and for the Western District. At Law.

CATHERINE SCHLEMMER, Plaintiff,

vs.

THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Now comes Catherine Schlemmer, plaintiff herein, and says:

That on or about the ninth day of November, 1903, this Court entered judgment herein in favor of the defendant, and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

A. J. TRUITT,
EDW. A. MOSELEY,
Attorneys for Plaintiff.

147 *Order Allowing Writ of Error.*

In the Supreme Court of Pennsylvania in and for the Western District. At Law.

CATHERINE SCHLEMMER, Plaintiff,
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, Defendant.

This 7th day of April, 1905, came the plaintiff, by her attorneys, and filed herein and presented to the Court her petition praying allowance of a writ of error intended to be urged by her, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceeding may be had as may be proper in the premises.

In consideration whereof the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred Dollars, which shall operate as a supersedeas bond.

H. B. BROWN,
Associate Justice Supreme Court of the United States.

148 (Copy.)

Washington Agency, No. 868.

Know all men by these presents, that we, Catherine Schlemmer as principal and American Surety Company of New York, New York, as sureties, are held and firmly bound unto The Buffalo Rochester & Pittsburgh Railway Company in the full and just sum of Five Hundred Dollars, to be paid to the said The Buffalo Rochester & Pittsburgh Railway Company and its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly ad severally by these presents.

Sealed with our seals and dated this 1st day of May in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Supreme Court of Pennsylvania in a suit depending in said Court, between Catherine Schlemmer, plaintiff and appellant and The Buffalo, Rochester & Pittsburgh Railway Company defendant and appellee a judgment was rendered against the said Catherine Schlemmer and the said Catherine Schlemmer having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Buffalo, Rochester & Pittsburgh Railway Company citing and admonishing it to be and appear

at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such, That
149 if the said Catherine Schlemmer shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

CATHERINE SCHLEMMER. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By JNO. S. LOUD, [SEAL.]
Resident Vice President.
Attest: L. BERT NYE, [SEAL.]
Resident Assistant Secretary.

Sealed and delivered in presence of
CECIL SMITH,
CLARENCE DODGE,
CLAUDE B. BROWN,
Witnesses as to surety.

Approved by
BROWN,
Associate Justice of the Supreme Court of the United States.

150 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Catherine Schlemmer, plaintiff and appellant, and The Buffalo, Rochester and Pittsburgh Railway Company, defendant and appellee wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
151 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff and appellant

as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of May, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
BROWN,
Associate Justice of the Supreme Court of the United States.

152 [Endorsed:] Writ of Error. Filed May 6, 1905. Supreme Court, W. D. Geo. Pearson, Prothonotary of Supreme Court.

153 UNITED STATES OF AMERICA, *ss:*

To the Buffalo, Rochester and Pittsburgh Railway Company, Greeting;

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania, wherein Catherine Schlemmer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States, this fourth day of May, in the year of our Lord one thousand nine hundred and five.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

154 Now June 2, 1905, I hereby acknowledge receipt of a copy of the within citation.

C. H. McCAULEY,
Solicitor of Buffalo, Rochester & Pittsburg Railway Company.

155 UNITED STATES OF AMERICA,
Supreme Court of Pennsylvania, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Pittsburgh, this 5th day of June, 1905.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON,
Prothonotary Supreme Court Pennsylvania.

Cost of Suit.

Cost of Transcript paid by Plaintiff.....$106.

GEO. PEARSON,
Prothonotary Supreme Court Pennsylvania.

Endorsed on cover: File No. 19,794. Pennsylvania Supreme Court. Term No. 292. Catherine Schlemmer, Plaintiff in Error, *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Filed June 7th, 1905. File No. 19,794.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
JAN 16 1907
JAMES H. McKENNEY,
CLERK

No. 41.

CATHERINE SCHLEMMER, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

FREDERIC D. MCKENNEY,
LUTHER M. WALTER,
Attorneys for Plaintiff in Error.

EDWARD A. MOSELEY,
A. J. TRUITT,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23445

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 41.

CATHERINE SCHLEMMER, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

Preliminary Statement.

Catherine Schlemmer, widow of Adam M. Schlemmer, deceased, in her own right and on behalf of her two minor children, instituted this action of trespass in the court of common pleas of Jefferson county, Pennsylvania, on March 20, 1901, against the defendant in error, The Buffalo, Rochester and Pittsburgh Railway Company, a corporation organized under the laws of Pennsylvania and engaged as a common carrier in operating a line of railroad between Butler, in said State, and Rochester and Buffalo, in the State of

New York (1, 3, 53), to recover damages for the wrongful killing of said deceased.

Adam Schlemmer, on August 5, 1900, was in the employ of the defendant company performing the duties of flagman or rear brakeman on one of defendant's freight trains, and during the early evening of that date, while endeavoring to make a coupling under the direct orders of his immediate superior, the conductor of the train, his head was caught between the cars and so badly crushed that he died immediately thereafter.

The gravamen of the complaint against the defendant company is that one of the cars which Schlemmer was ordered to couple up and upon which he was working at the time of the accident was not equipped with "a legal coupler or coupling, as required by existing law," although the defendant was then engaged in transporting said car from Limestone, in the State of New York, through the State of Pennsylvania (4).

Damages were laid in the sum of $10,000 (4).

Defendant pleaded "Not guilty" (6), and the issue came on for trial at a regular term of the court of common pleas for the county of Jefferson, before a judge and jury (14). At the conclusion of plaintiff's evidence defendant moved for a compulsory nonsuit, on the ground that there was "no proof of any negligence on part of defendant in this cause," and because the evidence showed "that deceased was guilty of contributory negligence." This motion was granted, "with leave to the plaintiff to make a motion to take same off within four days" (9).

Within the time limited plaintiff moved the court to take off the compulsory nonsuit for, among others, the following reasons:

(*a*) The court erred in ruling as matter of law that the plaintiff was not entitled to recover in this case.

(*b*) The evidence showed that the deceased was not negligent and used all the care demanded by the circumstances.

(*c*) That under the United States statute (Act of March 2, 1893, 27 Stats., 532) specially pleaded in this case the deceased should not be deemed to have assumed the risks incident to the particular service he was performing, "owing to the fact that the car was not equipped with an automatic coupler."

(*d*) That the undisputed evidence showed that the defendant company had violated the law in such regard "and was, therefore, guilty of negligence which caused decedent's death."

(*e*) That the coupling which the deceased had attempted to make "was complicated, difficult, and dangerous" and the car coupler which he was required to handle in making such attempt was "not a reasonably safe appliance."

(*f*) That the car which was attempted to be coupled was of peculiar construction and was the first and only one of that pattern which had been handled by the deceased and his associates in many years of experience. It was equipped with an unusual and non-automatic coupler, which would not couple by impact, was without deadheads or bumpers, and the defendant company in accepting it for transportation, while "thus equipped," was guilty of negligence *per se* (10).

On the hearing the court held that the car in question "was not a car used in interstate commerce," such not being "its purpose nor the use to which it was being put," and, further, that even if it were "construed to come under the provisions of said act (the act of Congress of March 2, 1893, 27 Stats., 532), plaintiff could not recover, because the evidence "showed the decedent to be guilty of negligence that contributed to his death" (12).

The motion to take off the compulsory nonsuit was refused (13).

From such refusal plaintiff appealed to the Supreme Court of Pennsylvania, which court affirmed the judgment of the trial court (56).

To review such action the case comes before this court on writ of error.

Statement of Facts.

The defendant company, a few days prior to August 5, 1900, had received for transportation over its line, from Limestone, in the State of New York, to a point in Pennsylvania, a construction train consisting of seventeen cars and a steam shovel car. That train was hauled into defendant's yard at Du Bois, Pennsylvania, on the afternoon of said date and left on a side track therein (15).

Plaintiff's decedent, who had been serving defendant as a brakeman and flagman for three or four years (20), was a member of the freight crew which was ordered to take the construction train from Du Bois to Punxsutawney, Pennsylvania (39, 43). The crew, in obedience to orders, went into the yard with an engine and caboose. The caboose was left temporarily on the main track. The engine went on to the siding, coupled on to the forward end of the construction train, drew it out of the siding onto the main track, and backed it, the shovel car being at the rear end, toward the caboose, in order that it might be coupled to the caboose (17). The caboose was equipped with an automatic coupler of the M. C. B. type, and known as a Trojan coupler (26). The shovel car was equipped with a cast-iron drawhead fastened two or three feet back from the end of and underneath the body of the car; to this cast-iron drawhead there was fastened, by means of a pin passing through the hole in the drawhead, a drawbar three or four feet in length, weighing about eighty pounds. The unattached end of the drawbar had play up and down from about 27 inches above the rails to 36 or 37 inches above the rails, and had a pin-hole, or eye, therein which had to

be used in making fast to the coupler of the caboose. When horizontal the drawbar extended about a foot beyond the end of the shovel car. There was no projecting drawhead, bumper, buffer, or dead-woods to keep the body of the shovel car from coming against the caboose to which it was to be attached, and the box or body of the shovel car was of a height which allowed it to pass or lap over the drawhead and buffer of the caboose (16, 27, 43).

Schlemmer was directed to make the coupling between the caboose and the shovel car. To do this he had to go between the cars, take hold of the heavy drawbar hanging under the shovel car, and, while stooping or squatting, to keep his head and body below the level of the bottoms of the approaching cars, had to raise and guide the free end of the drawbar—the shovel car all the time slowly moving forward—into the small slot or hole (two by three inches) in the automatic coupler or knuckle on the caboose, the end of the drawbar being about the same size as the slot in the coupler on the caboose (25, 26, 35).

The rules of the company required brakemen "to sign for a stick" (22), but you could not stand "away outside and couple that link and not be in any danger at all." You could not "have made this coupling with a stick." "The pin was too heavy." "You could not have obeyed the rules of the company and made it with the stick" (23).

It was dusk and signals were being made with a lighted lantern. Schlemmer had his lantern with him, whether in his hand or on the ground does not appear. The conductor of the crew was standing to one side of the caboose as the train backed toward it and he called to Schlemmer to keep his head down. Schlemmer carefully endeavored to make the coupling, but the drawbar on the shovel car slipped by the coupler on the caboose and he failed to do so. The top of his head was caught between the bottoms of the shovel car and caboose and so badly crushed that he died almost immediately.

The steam shovel was a Martini steam shovel, used in construction work in building railroads (15); it was a machine on wheels (21); the wheels were regular, ordinary wheels, and it had two sets of trucks, a truck under the back part and a truck under the front part, just the same as any other truck (23); it was equipped with a drawhead and drawbar (15); the drawhead was "under the box of the car," between two and three feet, or "about two and one-half feet from the end of the car;" the drawbar was about three feet long and "would project past the end of the shovel car about a foot; it would weigh in the neighborhood of 75 or 80 pounds (16, 25); it had a pin-hole through its free end" (16); to make this coupling a man "would have to get between the cars, the steam shovel car, and the caboose, or else get down under" them; the drawbar had to be raised up and entered into the drawhead of the caboose, and the pin dropped down through (26); to avoid accident, it was necessary to keep down when you raised the drawbar—to keep your head down; he had to get down under; if you kept your head down and made the coupling, there was no danger (30); if a man making that coupling should miss it and not make it, there was nothing to keep them (the cars) from coming together; it was a dangerous coupling to make (34); the casting (drawhead) was of standard height and set under the body of the car (39); the drawbar, when it hung down, hung so it was 27 or 28 inches from the ground; it could be raised to 36 or 37 inches; if the drawbar was held up even with the drawhead (of the caboose), they would not come together, but in case it happened as it did, the drawbar not being raised high enough and got under the car, it would permit them to come together (43); to make the coupling with the caboose, the flagman "would have to get down underneath the car, and get down on the ground," "and hold up this drawbar," "and enter it into the drawhead of the caboose" (48); it was necessary to keep down in order to avoid danger; "if you keep down you are all right, if it

came back steady enough so he did not get run over" (49); any coupling that requires a person to go between the cars is dangerous (50).

The yard conductor testified that the freight conductor had his lantern lighted and stepped out and gave a signal to stop when the flagman went to make the coupling. "I seen he was too high * * * and I told him to keep down. He had got down, but raised his head up and I hallooed again (17), and I seen he was going to get pinched, and I turned my head away, and as soon as the cars parted enough to get through, I got through between the cars and the caboose and helped pick the man up. The top of his head was crushed." He had raised his head too high; there were dead-heads on the caboose, but not on the shovel car. When he attempted to make the coupling he missed it (18); when he raised the drawbar up in that drawhead to the patent coupler, the drawbar slipped by the drawhead, and the caboose and the end of the shovel car came together. The accident occurred between eight and nine o'clock (19). That was the only shovel car that the deceased was ever known to have handled (22).

At time of his death deceased was thirty-one years old, in good health, a steady worker, and his wages averaged from $65 to $80 a month (52).

Other than as above set forth, there was no testimony given at the trial upon which the defense of contributory negligence can be rested.

Jurisdiction.

In her declaration or statement of case the plaintiff asserted that the coupling of the shovel car "was exceedingly complicated and dangerous;" that it was not provided with "dead-woods," and "the drawhead itself was what is known as an old-fashioned one, not being a patent one or safe in any respect;" and that "said coupler was not a legal coupler or

coupling, as required by existing laws on" * * * August 5, A. D. 1900; that defendant was transporting said shovel car from Limestone, in the State of New York, through the State of Pennsylvania."

Wherefore plaintiff, "on account of defendants' negligence and carelessness, as aforesaid, in causing the death of her said husband, has brought this action."

In the course of the trial, in response to a ruling of the court upon the admissibility of certain evidence, counsel for plaintiff replied, "We will come to this, that under the United States statute they (defendants) are required to furnish a safety coupler" (17).

Before closing her evidence, plaintiff pleaded, "especially as part of the law in the case," the act of Congress of March 2, 1893, 52d Congress, 2 sess., c. 196; 27 Stats. L., 532 (53).

Plaintiff having rested, defendant moved for nonsuit on the ground, among others, that "the deceased failed to keep his head at least as low as the floor of the steam shovel; that this omission was the fault of the deceased exclusively; that deceased was guilty of contributory negligence and there could be no recovery in this case" (54).

This motion was sustained and nonsuit entered, with leave to plaintiff to move "to take it off" (54).

Plaintiff's motion to take off nonsuit as heretofore stated was rested upon the grounds that—

(1) The action of the defendant company in accepting for transportation the shovel car so equipped was in violation of law and constituted negligence which caused decedent's death.

(2) That the evidence established the fact that in attempting to make the coupling deceased was working by lantern light, and that he used all reasonable care demandable of him under the circumstances.

(3) That under the United States statutes specially pleaded in this case the decedent should not be deemed to have assumed the risks incident to the non-equipment of the shovel car with an automatic coupler (9, 10).

These grounds were severally urged upon the court in argument (10).

The trial judge refused to remove the nonsuit, holding, among other things, that—

> A citation of authorities is not necessary to show that the defendant company is not to be held for negligence because of the fact that it has undertaken to convey a steam shovel, equipped with a means of coupling which is not of the latest device, or even if it were dangerous, where the brakeman understood or was made aware of the difficulty or danger to be *guarded* against; nor if the injury was caused by the fault of the employee in taking unnecessary risks, or in failing to heed warnings or instructions, especially when given by his superiors whose duty it is to do so; nor by voluntarily placing himself unnecessarily in a dangerous position whereby he is injured.
>
> It is alleged that these rules are not applicable to the case at bar, or rather that the case at bar is removed therefrom by the act of Congress, which went into effect a few days prior to this accident, and which prohibits all carriers from hauling or permitting to be hauled on their lines any car used in interstate traffic which is not equipped with the automatic coupler, the eighth section of which provides, "that any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such common carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."
>
> It is urged that this steam shovel was not a "car used in interstate traffic," and therefore, the act of Congress is not applicable thereto. * * *
>
> * * * We are of opinion that this shovel car

was not a car used in interstate commerce or any other kind of traffic. Such was not its purpose nor the use to which it was being put.

But even were the steam shovel, as shown to have been operated or transferred and equipped, construed to come under the provisions of said act, we are of opinion that plaintiff is not entitled to recover, for the reason that her own testimony adduced at the trial showed the decedent to be guilty of negligence that contributed to his death.

True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employee to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

We think the true position to be, that the employee is placed in the position that he would be, in case he were furnished with a defective appliance, which fact is known to his employer but not, either actually or constructively, to the employee. In such a case the employee has not assumed the said risk incident to his employment, and yet we trust it would not be seriously contended that such an employee might recover for an injury to which his own negligence had contributed (11, 12).

* * * * * * *

It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover (13).

In support of her appeal to the Supreme Court of Pennsylvania, plaintiff assigned the following errors:

1. The holding that "the shovel car was not a car used in interstate commerce or any other kind of traffic."

2. The holding that "contributory negligence will bar a recovery for an injury inflicted by defendant's negligence which results from a failure to comply with statutory requirements" (60).

3. The refusal to submit the question of contributory negligence to the jury.

The Supreme Court of Pennsylvania affirmed the judgment of the trial court in a *per curiam* opinion, saying:

> Whether the act of Congress in regard to the use of automatic couplings on cars employed in interstate commerce, has any applicability at all in actions for negligence in the courts of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject (56).

To reverse this judgment the case has been brought into this court by a writ of error, and the errors assigned are substantially those which were assigned for argument before the Supreme Court of the State (59).

> Whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State.
>
> Carter *v.* Texas, 177 U. S., 442, 447, citing Neal *v.* Delaware, 103 U. S., 370, 396-397; Mitchell *v.* Clark, 110 U. S., 633, 645; Boyd *v.* Thayer, 143 U. S., 135, 180.

So, where in this court a party asserts that the final judgment of the highest court of a State denied to him a right

or immunity set up and claimed under the Constitution or laws of the United States, if upon examining the record this court can find that a Federal question was properly raised or that a Federal right or immunity was specially claimed in the trial court, then jurisdiction to review the judgment of such State court will not have been defeated by the mere failure of the highest court of the State to dispose of the question so raised or to pass upon the right or immunity so claimed.

Erie Railroad Co. *v.* Purdy, 185 U. S., 148, 154.

Section 2 of the act of Congress of March 2, 1893, "To promote the safety of employees and travelers upon railroads," &c. (27 Stats. L., 531), made it unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 8 of said act declared—

> That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employ of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

The act of Congress of March 2, 1903, "To amend an act entitled 'An act to promote the safety of employees and travelers upon railroads," &c., approved March 2, 1893 (32 Stats. L., 943), declares that the provisions and requirements of said act of March 2, 1893—

> shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab-

> irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith.

In the case of Johnson *v.* Southern Pacific Company (196 U. S., 1) this court, referring to the provisions of section 3 of said Act of 1903, which section declared that—

> "Nothing in this act shall be held or construed to relieve any common carrier * * * from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended," &c.,

said:

> "As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. * * * This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

In that case this court also declared that—

> "Manifestly the word 'car' was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives." * * * "We think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different

> kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars."

Replying to the objection of counsel, that the character of the dining car whose improper equipment caused the damages under consideration in that case, at the time and place of the injury, was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, the court said:

> "Whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras in Voelker *v.* Railway Company, 116 Fed. Rep., 867, that 'it cannot be true that on the eastern trip the provisions of the Act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'
>
> "Confessedly, this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip."

That the plaintiff intended to set up and claim, and did in fact at the proper time and in the proper manner claim, a "right, privilege, or immunity" under a statute of the United States, cannot well be questioned. That the decision of the trial court is against the right, privilege, or immunity so specially claimed is equally clear. The denial by the trial court of the federal right, privilege, or immunity so claimed is perpetuated by the decision of the State supreme court, although, in announcing its judgment of affirmance, that court professed not to have considered the federal question at all, and based its decision upon a supposedly non-federal

ground, *i. e.*, the alleged contributory negligence of the deceased.

The plaintiff in error here contends that the federal right, privilege, or immunity claimed by her, and denied by the decisions of the State courts, is inextricably interwoven with the supposed defense of contributory negligence on the part of the deceased, and that the application of the provisions of the federal statute invoked by plaintiff to the facts disclosed in evidence was the sole matter for adjudication before the State courts. The proper disposition of the questions so raised would have been decisive of the whole case.

Paraphrasing the language which this honorable court used in the case of Anderson *v.* Carkins, 135 U. S., 483, it is immaterial that the State courts considered the case to fall within the principles of general common law untrammeled by statutory enactments. "The grasp of the federal statute must first be released. The construction and scope of that are federal questions in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court."

A case arises under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.

Cohens *v.* Virginia, 6 Wheaton, 375.

Also whenever the rights set up by a party may be defeated by one construction or sustained by another.

Osborne *v.* Bank of United States, 9 Wheaton, 738.
Starin *v.* New York, 115 U. S., 248.

The jurisdiction of this court extends to every right protected by the laws of the United States, irrespective of the source whence such rights may spring.

New Orleans *v.* De Armas, 9 Peters, 224.

And the refusal of a State supreme court to consider a federal question which is controlling in a case is equivalent

to a decision against the federal right involved therein, and gives to this court jurisdiction to review its judgment.

Des Moines Nav., &c., Co. *v.* Iowa Homestead Co., 123 U. S., 552.

Phoenix Bank *v.* Risley, 111 U. S., 125.

While it is conceded that this court cannot enter upon the inquiry as to whether the finding of a jury in a State court is against the evidence,

Missouri, Kansas & Topeka R. R. Co. *v.* Haber, 169 U. S., 639,

nevertheless the question as to the sufficiency, competency, or legal effect of the evidence as bearing upon a question of federal law raised in the course of the trial, may be reviewed by this court as a supreme court of error of a State may review the proceedings of inferior courts of original jurisdiction.

Mackey *v.* Dillon, 4 Howard, 447.

Dower *v.* Richards, 151 U. S., 658.

Though it should be conceded that in the absence of any question as to the construction and application of the federal safety appliance law the defense of contributory negligence gives rise to questions of general law merely, which are finally determinable by the decision of the State court (Texas, &c., R. R. Co. *v.* Johnson, 151 U. S., 81, 98), still where, as here, contributory negligence as matter of defense is found and declared as matter of law by the State courts, and the plaintiff's right to immunity from the burdens of such defense set up under the provisions of a federal statute are by such declaration, in effect, if not in fact, denied, this court has jurisdiction to consider and determine for itself whether, under the provisions of the federal statute specifically invoked, the defense of contributory negligence is available to a defendant who had violated its express prohibitions, and, if so, then whether the evidence upon which such defense rested was of such a character as justified the

trial court in peremptorily instructing the jury to return their verdict against the damaged plaintiff.

The question as to the effect of contributory negligence as a defense in actions for damages arising out of a violation by an interstate carrier of the prohibitions of the Act of March 2, 1893, as amended was raised in the case of Johnson *v.* Southern Pacific Co., *ubi supra,* and was left open by this court as follows:

> "Finally, it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the circuit court of appeals did not consider this question, nor apparently did the circuit court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury under proper instructions."

If the defense of contributory negligence was open at all, the evidence in the case at bar upon that point was of such character as required at least that it should have been submitted to the jury for its consideration.

The extended discussion of the merits of each of these suggestions follows in appropriate order hereafter.

ASSIGNMENTS OF ERROR.

1. It was error to hold that "the shovel car was not a car used in interstate commerce or any other kind of traffic."

2. It was error to hold that "plaintiff's decedent was guilty of negligence which contributed to his death."

3. It was error to hold as matter of law that the alleged contributory negligence of deceased barred any recovery for damages resulting from defendant's negligence in failing or refusing to comply with the plain requirements of the United States laws.

4. If, under the circumstances of this case contributory

negligence was admissible at all by way of defense, then the refusal of the trial court to submit that question to the jury, and its further refusal to set aside the compulsory nonsuit entered in the cause constitute reversible error.

ARGUMENT.

It is the contention of the plaintiff in error that the so-called shovel car, which the deceased in the performance of his duty as a brakeman in the employ of defendant in error was endeavoring to couple up to the caboose, was a "car" within the purview of section 2 of the Act of March 2, 1893; that by the provisions of section 8 of said act deceased was granted immunity from the common law doctrine of assumed risks, in so far as any injury received by him while making such coupling was concerned, and that the existence of contributory negligence as a defense in such a case ought not and cannot reasonably be inferred from or predicated upon the mere occurrence of injury, there being no evidence that deceased recklessly, wantonly, or unnecessarily exposed himself to an obvious danger.

I.

The trial court erred in holding that "the shovel car was not a car used in interstate commerce or any other kind of traffic."

Section 2 of the act of March 2, 1893, commonly known as the Safety Appliance Act, provides:

> That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

In the case of Johnson *v.* Southern Pac. Co., 196 U. S., 1, this court held that the phrase "without the necessity of men going between the cars" applied both to the act of coupling and uncoupling, and further held that the coupler must couple with all other makes as well as with those of its own kind. We take it that there is no question that this shovel car was not equipped with couplers coupling automatically by impact, which could be uncoupled without the necessity of men going between the ends of the cars. In the present case there could be no coupling or uncoupling without the presence of a man between the shovel car and the car to which it was to be attached.

The fifth section of the original Safety Appliance Act provided:

> That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States, by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

In accordance with the provisions of this section, the standard height of drawbars for standard-gauge cars was fixed at

34½ inches, with a maximum variation of three inches between loaded and empty cars. This shovel car was standard gauge—that is, 4 feet 8½ inches wide between the rails—but instead of the drawbar being 34½ inches, or 31½ inches if it was a loaded car, the drawbar hung down to within 27 inches from the level of the tops of the rails, so that it was below the standard height at least 4½ inches. It is plain that the drawbar of this car in the matter of height above the tops of the rails did not meet the requirements of the statutes.

Although this act of Congress was approved on March 2, 1893, it did not go into effect until January 1, 1898. By its provisions the Interstate Commerce Commission was authorized, from time to time, after full hearing and for good cause, to extend the period within which any common carrier shall comply with the provisions of the act. Under this clause the railroads obtained, as to the second section, two extensions of time, amounting in the aggregate to two years and seven months, so that this section became effective in practice August 1, 1900 (8 I. C. C., 643 and 662). As to the fifth section, an extension of time amounting to seven and one-half months, or from July 1, 1895, to February 15, 1896, was granted by the Commission on application of carriers subject to the act (6 I. C. C., 332).

Employees engaged in the movement of interstate traffic are engaged in one of the most hazardous occupations. Thus every year thousands lose their lives and many more thousands have suffered serious bodily injury. It was to remedy the conditions of employment that Congress passed the original Safety Appliance Act and its amendments. The intention of Congress, declared in the preamble and in the act, was "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," whereby the danger and risks con-

sequent upon the existing system might be reduced as far as possible. In the Johnson case, *supra,* this court held that the primary object of this act was to promote the public welfare by securing the safety of employees and travelers, and in that aspect it was remedial; and that although for violation of the act there was provided a penalty of one hundred dollars, recoverable in a civil action, the design to give relief was more dominant than to inflict punishment, and for that reason absolute strictness of construction should not be applied, but such construction should be given as would accomplish the intent of Congress.

The first question to be answered is, Was this shovel car a car within the meaning of the act?

In a number of States, construing the employers' liability acts, it has been held by the courts that the word "car" will include a locomotive, a tender, a hand car, or a push car as well as the ordinary freight car or passenger car. In the case of Kansas City, M. & B. R. Co. *v.* Crocker, 11 So., 262, 95 Ala., 412, the definitions given in the Century Dictionary that a car is a vehicle "running upon rails" and in Webster's Dictionary, that a car is "a vehicle adapted to the rails of a railroad" were accepted as being correct. In the case of Thomas *v.* Georgia R. & Banking Co., 38 Ga., 222, 224, it was held that a hand car as well as a steam car was included within the provision of the code, rendering railroad companies liable for injuries done in the running of cars.

A Texas statute provides that a railroad corporation shall be liable for all damages sustained by any employee while engaged in "operating cars" by reason of the negligence of any other employee. In discussing the meaning of the word "car" in this statute, the court held that the word signified any vehicle adapted to the rails of a railroad and would embrace a hand car as well as freight or passenger car (Perez *v.* San Antonio & A. P. Ry. Co., 678 S. W., 137; 28 Tex. Civ. App., 255). It has also been held under the same statute that a push car 8 or 10 feet long and 3 or 4 feet high, used for

transporting rocks down an inclined plane to a rock-crusher, is a "car" within the meaning of the act (Texas & P. R. Co. *v.* Webb, 72 S. W., 1044; 31 Tex. Civ. App., 498).

The correctness of such conclusions is guaranteed by the decision of this court in Johnson *v.* Southern Pac. Co., from which we venture to repeat an extract heretofore quoted:

> And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in the construction of this act. (Cases cited.)

It would seem to be sufficiently established that a "shovel car" is a car within the meaning of the act, but it remains to be seen whether as such it was subject to the requirements of the act.

From an examination of sections 2 and 5 of the act it will be seen that the application of the statute is varied as to the use of the car. In the former section the "car" must be used in *moving* interstate traffic; in the latter it need only be *used* in interstate traffic. In order to be subject to the act, the "car" need only be used in interstate traffic, and it does not have to be used in the movement of interstate traffic; but this is a technical and not a real distinction. What the statute was intended to inhibit was the use of any car in an interstate train which did not comply with the statute.

Bouvier's Law Dictionary defines "traffic" as commerce or trade. The Century Dictionary, among other definitions, gives the following:

2. The coming and going of persons or the transportation of goods along a line of travel, as on a road, railway, canal, or steamship route.
3. The persons or goods, collectively, passing or carried along a route or routes.
4. Dealings; intercourse.

English's Law Dictionary defines "traffic" to be "The business of transporting persons, animals, or goods."

Section 1 of the English Railway and Canal Act of 1884 defines the word "traffic" as used in that act as follows:

> "Traffic" includes not only passengers and their luggage and goods, animals and other things conveyed by any railway company or canal company or railway and canal company, but also carriages, wagons, trucks, boats and vehicles of every description adapted for running or passing on the railway or canal of any such company.

A great many writers of text books, and we may add of judicial decisions, used the word "traffic" interchangeably with the word "commerce." An examination of the language of the act under discussion shows such use on the part of Congress. The preamble uses the word "commerce." In the first section "commerce" is used once and "traffic" twice. Section 2 uses the word "traffic." Sections 2 and 4 use the word "commerce." Section 5 uses the words "commerce" and "traffic" once each.

We think it quite evident that in this act Congress intended to use the two words synonymously and to avoid repetition. This court has well settled the meaning of the word "commerce" as used in the "commerce clause" of the Constitution. While some decisions make "commerce" of a broader import than the word "traffic," still, running through these decisions the words are used interchangeably. We cite a few cases showing that "traffic" as well as "commerce" covers the transportation of persons and property, and that the words "interstate traffic" cover all transportation of persons and property where such transportation crosses State lines.

In Gibbons *v.* Ogden, 9 Wheat., 1, Chief Justice Marshall defined "commerce" as follows:

> Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse (page 189).

Mr. Justice Johnson, in his concurring opinion in the same case, at page 229, says:

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the *vehicle*, the agent, and the various operations, become the objects of commercial regulation.

In the case of County of Mobile *v.* Kimball, 102 U. S., 702, this court said:

> Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system.

In the case of Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 204, we find this expression:

> It needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation.

In the Lottery Case, 188 U. S., 321, on page 345, in discussing the import of the word "commerce," the court, after reviewing prior decisions, said:

> What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinarily subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitles the holder to the payment of a certain amount of money therein specified also constitute commerce among the States? * * *
>
> They show that commerce among the States embraces navigation, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulation to be adopted Congress has a large discretion, which is not to be controlled by the courts simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

On page 354 the court further said:

> We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

What was the nature of the service being performed by the defendant at the time plaintiff's decedent was injured? From the record it is evident that the shovel car was being transported as freight; and while hauling this construction train, of which the shovel car was a part, the defendant did not cease to be a common carrier (Peoria & Pekin Un. Ry. Co. *v.* C., R. I. & P. Ry. Co., 109 Ill., 135).

It may be insisted that this shovel car was not used in moving interstate traffic, as it was traffic itself; but such a construction of the act would not be in line with the decisions of this court to the effect that such construction shall be given as will accomplish the intent of Congress.

The defendant in error at the time of the accident to Schlemmer was performing a transportation service simply. So far as the statutory duty of defendant in error was concerned, the fact that the steam shovel was bolted to a platform carried on trucks does not affect the nature of the services rendered. Whether the steam shovel was simply set upon or was bolted to and made a part of the platform of the car does not affect the dangers incident to the use of the coupling appliances nor affect the character of the service rendered by the carrier. Congress intended to obviate the very danger which was here necessarily incurred by plaintiff's decedent. The purpose for which the machine was to be used makes no difference, so far as the defendant in error and its employees were concerned. It was in fact a car carrying a load which was being moved from a point in one State to a point in another.

We therefore submit that this shovel car was a car used in interstate traffic, and hence subject to all the requirements of the Safety Appliance Act.

II.

IT WAS ERROR TO HOLD AS MATTER OF LAW THAT THE ALLEGED CONTRIBUTORY NEGLIGENCE OF DECEASED BARRED PLAINTIFF'S RIGHT TO RECOVER DAMAGES GROWING OUT OF DEFENDANT'S NEGLIGENCE IN FAILING OR REFUSING TO COMPLY WITH THE PLAIN REQUIREMENTS OF THE UNITED STATES LAWS.

In discussing this assignment of error we shall confine our argument entirely to the Safety Appliance Act, especially section 8 thereof, which reads as follows:

> That an employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employement of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

In construing this section it is necessary to ascertain, if that can be done, what the Congress had in mind when enacting the statute. It is plain that it was primarily the intention of the Congress by this provision to relieve employees of common carriers from the stringent rules of the common law governing defenses in actions for damages between servants and master. Secondarily, by removing from the carrier's reach a greatly favored method of defense in such cases it hoped to at least induce, if not compel, the carriers to a prompt and strict compliance with the requirements of the same law as to the equipment of its cars.

The intention was to render the company at least *prima facie* liable to respond in damages in every case where an employee engaged in handling improperly or defectively equipped cars received an injury. By abolishing the de-

fenses incident to the relation of employer and employee it was intended to make it to the greater interest of the carrier to equip its cars as required by law.

As was said by Caldwell, J.:

> Whenever it is made to appear to a railroad company that it costs more to pay the damages assessed against it by the verdicts of juries for maintaining a dangerous condition of its track or appliances than it would cost to substitute safe ones in their place, the substitution is quickly made. But as long as courts hold as matter of law that what the witnesses in this case declare to be "simply a death-trap" may be maintained with impunity and without incurring any pecuniary liability, the death-trap will remain and the slaughter go on.

So that, in its desire to protect trainmen, Congress took this additional means to enforce compliance with the law.

At Limestone, in the State of New York, the defendant is approached by a shipper anxious to have this shovel car conveyed to Crenshaw, in the State of Pennsylvania. The defendant sees the condition of the car and notices, or should have noticed, its equipment, so far as safety appliances are concerned. Now, before accepting this car and moving it on its line, it was the defendant's duty, arising from the statute, to inspect the couplers and see that they were in good condition—that they were reasonably safe appliances—in order that the safety of its employees might not be endangered.

In Railroad Co. *v.* Mackey, 157 U. S., 72, Mr. Justice Harlan said:

> We are of the opinion that sound reasoning and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train.

In the case of this shovel car the slightest inspection would have shown that the coupling did not comply with the requirements of the statutes or the general law requiring reasonably safe appliances. Under our construction of the law, and we believe it is sustained by the decisions of this court and by those of numerous other courts, as well as by text-writers, the receipt of this car by the defendant in an unlawful condition was gross or willful negligence.

In the case of Shumacher *v.* St. Louis & S. F. R. Co., 39 F. R., 174, the court said:

> A party is guilty of gross negligence if he fails to exercise the care required of him by the law. This care required by the law is such care as is necessary under the circumstances to secure the protection of the lives, persons, and property of other persons.
>
> Gross negligence is the absence of the care necessary under the circumstances to secure protection to life, person, and property. The entire absence of that prudent and proper care necessary to render safe life, person and property, and the failure to exercise such care shows a conscious indifference to consequences which makes a state of case in which there is constructive or legal willfulness.
>
> In a case where, as a probable consequence, the danger is very great, the greater the degree of care required. In such a case the law requires the very highest possible care to prevent an injury.
>
> An act characterized by a high degree of negligence, or, as is familiarly called, "gross negligence," is the counterpart of a willful act. When the danger is great, and the care to prevent disaster is very slight, or none at all, the neglect of a party becomes a willful act in law.
>
> The highest duty of a man is to protect human life, or the person of a human being. That duty is never performed so as to escape responsibility until all possible care, under the circumstances, has been exercised.

In the case of Railroad Co. *v.* Lockwood, 17 Wall., 382, this court defined "gross negligence" as the failure to use

slight care when required. In the case of Milwaukee, etc., R. Co. *v.* Arms, 91 U. S., 495, "gross negligence" was said to be a relative term and meant the absence of care necessary under the circumstances. Another citation widely used is this: "Gross negligence" is the want of even slight care and diligence (Louisv. & Nashv. R. Co. *v.* McCoy, 81 Ky., 403, 409; Kiley *v.* Western Un. Tel. Co., 267 N. Y. Supp., 532, 535).

In Bannon *v.* B & O. R. Co., 24 Md., 108, 124, the court defined "gross negligence" as the omission of that care which even inattentive and thoughtless men never fail to take of their own property. It is a violation of good faith.

In the case of Schindler *v.* Milwaukee, etc., R. Co., 87 Mich., 400, the court said that "gross negligence" is the intentional failure to perform a manifest duty, in the reckless disregard of the consequences, as affecting the life or property of another, or a thoughtless disregard of consequences without any attempt to avoid them.

In the case of United States *v.* Southern Ry., 134 Fed. Rep., in construing the Safety Appliance law, referring to the fact that an "M. C. B. defect card" had been placed on certain cars having defective safety appliances, the card being notice to all connecting lines that the defendant had sent the car out defective, and that other lines using the car would not have to account to defendant for the particular injury or defect noted on the card, Judge Humphrey said:

> Here is such deliberate violation of the statute as to amount to defiance of the law.

So we think the courts in their construction of "gross negligence" have given the term such a meaning as will permit its application to the facts in this case, wherein the defendant accepted and transported this shovel car knowing full well that it did not comply in any degree with the requirements of the statute, and that it would be absolutely necessary for its employees to handle such car in coupling

and uncoupling, thereby adding to their already grave dangers of injury.

It has been held by some State courts, in construing safety-appliance laws, that contributory negligence cannot be pleaded as a bar to recovery by a plaintiff when the proximate cause of plaintiff's injury was the failure of defendant to comply with a statute (Carterville Coal Co. *v.* Abbott, 181 Ill., 495; Kansas City, Memphis & Birmingham R. R. *v.* Flippo, 138 Ala., 487).

The proximate cause of the accident in this case was the failure to have couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars. Had there been on this shovel car automatic couplers, Schlemmer would not have been compelled to go between the cars and he could not have suffered the injury he received. This court in 191 U. S., 334, in the case of Railroad Co. *v.* Holloway, held that the neglect of the carrier to furnish brakes upon the engine was *prima facie* evidence of negligence. In that case a horse had gotten upon a trestle, and the failure to have brakes rendered it impossible to stop the locomotive in time to prevent a collision with the horse, by reason of which collision the plaintiff was severely injured. We quote from that opinion:

> The purpose of the brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident was, therefore, a proximate cause thereof.

In the case of Elmore *v.* Seaboard Air Line Ry. Co., 41 S. E., 786, Mr. Justice Clark, after citing Greenlee *v.* Ry. Co., 122 N. C., 977, and Troxler *v.* R. Co., 124 N. C., 191, said:

> This proposition is settled in the cases above cited, to wit, it is the duty of the defendant to use automatic

> couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is a continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the *causa causans.*

The same court, in the case of Fleming *v.* Southern Ry. Co., 131 N. C., 476, had before it a case brought by a brakeman who had been injured in handling a drawbar similar to the one in this case, excepting that it was 40 pounds heavier and 2 feet longer. In referring to the failure of the carrier to comply with the law in that case, the court said:

> There can then be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury.

In the case of the Union Pac. Ry. Co. *v.* McDonald, 152 U. S., 262, this court held that the company was guilty of negligence because it had not complied with the statute requiring owners of coal mines to fence their slack piles and abandoned pits. We quote from that opinion:

> The only question that could arise in this part of the case is whether the court should have instructed the jury—as, in effect, it did—that the failure of the company to put a fence around the slack pit, as required by the statute of Colorado, was negligence, of which the plaintiff could complain in this action for personal injuries sustained by him. Primarily, that statute was intended for the protection of cattle and horses. But it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. In Hayes *v.* Michigan Central Railroad, 111 U. S., 228, 240, which was an action by an in-

fant for personal injuries sustained by the alleged negligence of a railroad company in not properly guarding its line within the limits of Chicago, this court speaking by Mr. Justice Matthews, said: "In the analogous case of fences required by the statutes, as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." The non-performance of the railroad company of the duty imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty.

In the case of *The Pennsylvania*, 19 Wall., 125, this court held that if it clearly appears that the fault committed by a vessel has nothing to do with the disaster which has occurred, the liability for damages is against the vessel alone which has produced the disaster; still, where a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that certainly it did not, and that the damages in that case were to be equally divided between the two vessels, as they were both in fault, the steamer in moving at so rapid a rate in so dense a fog in such a place, the brig for her violation of the act of Congress in using a bell instead of a fog-horn.

Mr. Justice Cooley, in the case of Flint, etc., R. Co. *v.* Lull, 28 Mich., 510, 515, in discussing the reasons for his holding that contributory negligence would not bar a re-

covery from a defendant which had violated a statute, used words which are entirely applicable to the present case, saying:

> Indeed, if contributory negligence could constitute a defense, the purpose of the statute (requiring railroad companies to fence right of way) might be in a great measure, if not wholly, defeated; for the mere neglect of the railroad company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own grounds in the vicinity of the road; so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent.

We are not unmindful of the fact that in a number of cases it has been held that although the violation of a statute is negligence *per se*, yet contributory negligence on the part of the plaintiff will nevertheless bar a recovery; but such conclusion is not founded on right, justice, or humanity. The business of transporting commerce over the railroads of the country is one of the most hazardous in which men can be engaged and this court has said in Mather *v.* Rillston, 156 U. S., 399, that in occupations attended with great danger, it is the master's duty to furnish all appliances readily attainable known to science for the prevention of accidents.

The law specifically provides that the employee shall not be deemed to have assumed the risk of handling defective cars, but the law can never prevent the employee from being subjected to the danger of bodily harm so long as it permits the employee to handle a car defectively equipped.

The employee must either go between the cars and use the defective appliance or else the entire transportation service of the carrier must be obstructed. Such a condition would endanger not only the train hauled, but the trains coming

from either direction, and would bring about a condition simply intolerable. The employee, recognizing his duty in the premises, does go in at the risk of danger to himself and performs the duty the best way he can with the appliances placed at his disposal by the carrier.

So long as it is not unlawful for him to attempt the coupling he will undertake it, although in so doing he is in imminent peril of losing life or limb.

We submit that it should be the uniform law of this country, so far as this court can make it, that no carrier upon being sued for damages occasioned by its violation of the statute should be permitted to say to the plaintiff, its employee, we do not have to recompense you for your pain and suffering because you did not use the extraordinary care to avoid injury which the dangerous character of the coupling device at hand made necessary. The lawbreaker should not be permitted to plead the lack of care on the part of its employee to defeat the demand for compensation for damages primarily due to its own lawless act.

III AND IV.

THE COURT ERRED IN NOT SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY.

From the evidence, it clearly appears that Schlemmer was an experienced employee, who had served for several years as head and middle brakeman, and that, as far as the ordinary routine work of the railroad was concerned, Schlemmer was a capable man.

It does, however, appear from the record that the hauling of a shovel car was a very infrequent occurrence. If Schlemmer's experience was similar to that of Mr. Coates, the yard conductor, and similar to those of the witnesses in this case, he had handled but few, if any, shovel cars. Mr. Coates, who had been in service 15 years (Record, p. 15), "had seen

but few" (Record, p. 22). Mr. Gensaner, brakeman, who had been in service 15 years (Record, p. 24), testified that this was the only shovel car that he had ever handled or helped to handle (Record, p. 26). Mr. Neilson, freight conductor, who had been in the service 10 years (Record, p. 28), testified that this was the only shovel car that he had ever handled (Record, p. 39). If any inference, so far as the plaintiff's decedent is concerned, can be drawn from this evidence, it is that the coupling and uncoupling of this shovel car to the caboose was new work to him.

To hold Schlemmer guilty of contributory negligence is to find that in performing his duty in coupling this shovel car to the caboose, he failed to exercise such care for his personal safety as the circumstances demanded; that he did some act which an ordinarily prudent man would not have done under the circumstances. Now, let us see what the witnesses in this case testified to with reference to the acts of plaintiff's decedent in attempting to make the required coupling.

COATES, yard conductor (Record, p. 17, 18):

> I told Mr. Schlemmer to keep down. He had got down, but raised his head up, and I hollered again. And I seen he was going to get pinched, and I turn my head away; and as soon as the cars parted enough to get through, I got between the car and the caboose and helped pick the man up.
>
> * * * * * * *
>
> Q. After that what did you do? What caused this accident? What happened when he went to couple there?
>
> A. Well he got his head too high.
>
> Q. Well, did he make the coupling?
>
> A. No, he didn't make the coupling. He missed it.
>
> Q. He missed it?
>
> A. Yes, sir.

Page 19:

Q. How did he miss it?

A. When he raised the drawbar up in that drawhead to the patent coupler the drawbar slipped by the drawhead.

Q. And the caboose and the end of the shovel car came together.

A. Came together; yes, sir.

Cross-examination:

Q. When you called to him, directing him to keep down the first time, what reply, if any, did he make?

A. He did not say anything at all.

Q. But he did stoop, did he?

A. Yes.

Q. And the second time you say you called to him to keep down?

A. Yes, but it was too late then.

GENSANER, brakeman, page 30:

Q. And if you kept your head down, there was no danger of injury, was there?

A. If you kept your head down and made the coupling, then there was no danger.

NEILSON, freight conductor, page 40:

Q. Now, when it came to coupling this shovel car to the caboose, tell us what took place that evening.

A. Well, we backed down within about three or four feet of the caboose, and Mr. Schlemmer said he would enter this drawbar in that and drop the pin, and I told him I would set the pin and it would drop itself. I went in and got the pin, and I told him when he went down under the car to take hold of this bar, to be sure and stay down low, so if he missed the coupling he would be in clear so it would not catch him.

* * * * * * *

Page 42:

Q. Mr. Neilson, what time of day did this take place?

A. 8.55.

Q. Had you your lantern there?

A. Yes, sir.

Q. Was it lit?

A. Yes, sir.

Q. Was Mr. Schlemmer's lit?

A. I could not say whether his was lit or not. It more than likely would be.

* * * * * * *

Page 45:

Q. Didn't he try to follow out your instructions?

A. If he had followed the instructions he would not have been hurt.

Q. Didn't he try to follow out your instructions? Didn't he get down there on the ground?

A. Yes, sir.

Q. Didn't he have his lantern there?

A. I could not say whether he had his lantern or not.

Q. Didn't he hold up the big, heavy bar there to the place?

A. He attempted to do it (page 46).

Q. And didn't he try to keep his head down, too?

A. I do not know whether he did or not. I suppose he did.

Q. What part of his head was crushed?

A. The upper part.

Q. His whole head was not crushed?

A. No, sir.

Q. Well, then, he certainly kept down part of his head?

A. Yes, sir.

We do not believe that long citations of authorities are necessary, or that any critical analysis of the testimony is required to show that the court below erred in its holdings set forth in these two assignments. As shown by the record (pages 53 and 54), the defendant's attorney in the trial court moved for a compulsory nonsuit on these two grounds: First, that there is no proof of any negligence on the part of the defendant in this cause; and, second, that the evidence on

behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel; that this omission was the fault of the deceased exclusively; that deceased was guilty of contributory negligence, and that there can be no recovery in this case.

The court sustained the motion for the nonsuit, holding that the question was a matter of law to be decided by the court. The record does not disclose what, if anything, further was said by the trial court at this time; but, in the opinion by the court in refusing to take off the compulsory nonsuit, the court held as a matter of law "that plaintiff's decedent was guilty of negligence that contributed to his death."

Instead of the evidence showing that the deceased had failed to exercise proper care for the safety of his person, we think it is evident that he did nothing which a prudent man would not have done under the circumstances, and that he failed to do nothing which a prudent man would have done. Even if it be true that Schlemmer was told to "look out" for his head, nevertheless the evidence shows that he did take this precaution; the fact that only a part of the top of his head was crushed amply indicates that he was endeavoring to keep his head below the danger point.

The record clearly indicates that the court below erred in holding as matter of law that the deceased was guilty of contributory negligence. The question at least should have gone to the jury. This court has in a number of cases held that where there is any room for doubt the evidence must be submitted to the jury. In one of the earliest cases, Railroad Co. *v.* Stout, 17 Wall., 657, at page 663, Mr. Justice Hunt, in discussing the question as to submission of questions of this kind to the jury, said:

> It is true in many cases that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury. This is true in that class of cases where the existence of such

facts comes in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of

the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, and they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

We have already discussed, under the previous assignment, the question of proximate cause, but attention should be here called to the rule, which is that this question is one to be determined by the jury rather than the court. It is not a question of science or legal knowledge, but is to be determined as a fact, taking in view all the circumstances surrounding the accident. The primary cause may be the proximate cause of the accident, although it may operate through successive instruments, as an article at one end of a chain may be moved by force applied at the other end. The question always is, Was there an unbroken connection between the wrongful act and the injury? Was it a continuous operation?

In the case of Milwaukee & St. Paul Ry. *v.* Kellogg, 4 Otto, 469, at page 475, the court said that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence to have been foreseen in the light of the attending circumstances. So in this case the defendant, not only in view of the duty placed upon it by the general law, but in view of its statutory duty, should have taken such steps as were necessary to prevent the accident that afterwards happened to Schlemmer.

Defendant ought to have foreseen, in the light of the circumstances surrounding train operations, that its employees would have to couple and uncouple the shovel car, and that, as its equipment was dangerous, the risks of operation would be greatly increased. In the case last cited it was held: "The true rule is, what is the proximate cause of an injury is ordinarily a question for the jury." The action of the trial court prevented the jury from passing upon this feature of the case.

In reading the testimony of Coates and Neilson, fellow-employees of Schlemmer, and who are still in the employ of the defendant, one cannot help but be impressed with the—not to say bias, but to put it charitably—reluctance with which these witnesses gave their testimony. How much the more would this have impressed the jury, who could see the witnesses while giving their testimony and determine their credibility. In the case of Texas & Pac. R. Co. *v.* Carlin, 189 U. S., 354-361, this court, in discussing the evidence of the bridge foreman, an employee of the defendant, said:

> The foreman's evidence was that of a somewhat interested witness. If the foreman did in fact neglect to perform his duty by looking over the track just prior to the coming of the train for the purpose of seeing that the bridge was clear of obstructions, it might be quite a serious matter for him in his future relations with the company. At any rate, no man is an absolutely disinterested witness when his testimony relates to the performance or non-performance of a duty which he owed on account of the position he occupied. It was, therefore, a question for the jury as to the measure of credence that should be given to his testimony.

We submit that the same rule should have been applied here and that the measure of credence to be given the evidence should have been left to the jury. The superior officers of the defendant were present at the trial of this case and their very presence could not fail to have its effect adversely

to the interests of the plaintiff in this case. The statement that the coupling on this shovel car was one of the "simplest known" is ample evidence to an unbiased mind that the witnesses were going to an extreme length to save the defendant in this case. It is a well-recognized rule of law that one does not have to accept the evidence of a witness when in one's own judgment it is false.

In the case of Northern Pac. R. R. *v.* Everett, 152 U. S., 107, this court held that the following was an appropriate case for submission to the jury:

> It appears that Everett was a young and inexperienced man; that this was his first service in attempting to couple a car with a projecting load; the duty he was expected to perform gave him no time to narrowly inspect the approaching car or to observe its condition. His attention was not called to the projecting timber until he was in the very act of making the coupling, and when his effort to avoid it was too late. He had first to throw the switch to receive the approaching car, and then run ahead and get ready to put the pin in the drawhead. It was shown that there was no pin in the drawhead of the stationary car, and he was obliged to pick one up and put it in place ready to make the coupling. These duties gave him no opportunity to closely scan the car that was in rapid motion behind him. In such circumstances, when the whole transaction is the work of a moment, and when his duty calls upon him to act promptly, a man cannot be expected to act with circumspection. At all events, we think that, in view of the fact that the car was improperly loaded, that Everett was new and inexperienced in such work, and that he was required to perform the double duty of throwing the switch and making the coupling, the case was an appropriate one for submission to a jury.

So to the same effect was the holding of the New York Court of Appeals in the case of Goodrich *v.* New York Central & Hudson River R. Co., 5 L. R. A., 750. We quote from that opinion:

> The question as to the plaintiff's contributory negligence was, I think, one of fact for the jury. He testified that, when the cars were four or five feet apart, he saw that the bumper of the moving car was lower than the bumper of the stationary car. It does not appear that he observed that it would pass under the bumper of the stationary car, or that there was any danger that the dead-woods would come together. On the contrary, he appears to have thought that the coupling could be made with the straight link that was in the drawhead. He had a right to assume that fact, and that the coupling appliances were in good order. It was only at the moment that the cars were about to collide that he discovered his error. The court cannot affirm that for such an error of judgment, induced, as it was, to some extent, by defendant's neglect, he is to be held to have been careless. Under such circumstances, when the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of the danger that confronts him. If he acts the part of a prudent man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him; and whether he acted such a part under the circumstances of this case was for the jury to determine.

In the case of Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S., 551, this court approved an instruction by the trial court to the effect:

> That any negligence of the plaintiff, directly contributing to the injury, would incapacitate him from recovering; and that if he negligently placed his foot between the timbers of the wharf, and allowed it to remain there while the steamboat was departing, and it was injured while so placed, it was for the jury to decide whether there was such negligence as would disentitle him from recovering.
>
> That the burden of proof was on the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury.
>
> That contributory negligence of the plaintiff would not prevent him from recovering, if the defendant

might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

In discussing two instructions given by the judge in the foregoing case, this court said:

> The one, "The burden of proof is, however, upon the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury," was in accord with the uniform course of decision in this court (Railroad Co. *v.* Gladmon, 15 Wall., 401; Indianapolis & St. Louis R. *v.* Horst, 93 U. S., 291; Hough *v.* Railway Co., 100 U. S., 213; Northern Pacific R. *v.* Mares, 123 U. S., 710, 720, 721).
>
> The other instruction was in these words: "There is another qualification of the rule of negligence, which it is proper that I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."
>
> The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial (Radley *v.* London & Northwestern Railway, 1 App. Cas., 754; Scott *v.* Dublin and Wicklow Railway, 11 Irish Com. Law, 377; Austin *v.* New Jersey Steamboat Co., 43 N. Y., 75; Lucas *v.* Taunton & New Bedford Railroad, 6 Gray, 64, 72; Northern Central Railway *v.* Price, 29 Maryland, 420; see also Williamson *v.* Barrett, 13 How., 101, 109).
>
> It was argued that the instruction was inapplicable, because there was no evidence that the defendant knew of the peril of the plaintiff, or had either time or opportunity, by the exercise of any degree of care, to guard against it; that if his negligence consisted in standing in a dangerous position,

> too near the edge of the wharf, the defendant was not bound to anticipate his remaining in that position; but that his negligence in fact consisted in placing his foot between the flooring and a fender pile, which the defendant could not have been aware of or guarded against.
>
> It is true that the instruction could not apply, and therefore, could not be understood by the jury to apply, to the latter alternative. But upon the question of the plaintiff's position and attitude the evidence was conflicting; and it was indisputable that the steamboat was approaching the wharf at his call, and for the purpose of receiving freight from his hands, and that her pilot and officers saw him as he waited on the wharf. The jury might well be of opinion that while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct and efficient cause of the injury.

There are two other decisions by this court to be noticed. The first of these is that of the B. & O. Railroad *v.* Baugh, 149 U. S., 368. The court held that the questions in this case were to be determined not by the decisions of the highest court of the State in which the case arises, but by the general law, gleaned from all the authorities and a consideration of the principles underlying the relations of master and servant. While the discussion on this case is based upon the determination of who were fellow-servants, still certain principles as to the relation of master and servant are set forth. We quote from that case:

> Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. Today the volume of interstate commerce far exceeds the anticipation of those who framed the Constitution, and the main channels

> through which the interstate commerce passes are the railroads of the county. Congress has legislated in respect to this commerce by the Interstate Commerce Act and its amendments (24 Stats., 379, c. 104), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars (Public Acts, 52d Cong., 2d sess., c. 113). The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every State line? If to a train running from Baltimore to Chicago it should, within the limits of the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through car and the company? Whatever may be accomplished by statute — and of that we have now nothing to say — it is obvious that the relations between the company and employee are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law.

This court in Grand Trunk Railway Co. *v.* Ives, 144 U. S., 408, announced certain ruling principles as to negligence, which apply with striking force to the situation in this case. In the Ives case the railroad company was running a train at a speed violative of a city ordinance. This court approved in that case an instruction of the trial court to the effect that, if from the evidence it was found by the jury that the train which inflicted the injury was moving at a rate of speed forbidden by the city ordinance, the law authorized them to infer negligence on the part of the railroad company as one of the facts established by the proof. The question of contributory negligence on the part of the injured party was also passed upon by the court, and it was held that the contributory negligence of the party injured was a question of fact to be determined by the jury. It was further stated by

the court that, although the injured party might have been guilty of want of ordinary care and caution, still the defendant was liable, if by exercising reasonable care and prudence it might have avoided the consequences of the injured party's negligence.

We quote from the syllabus of that case:

> The terms "ordinary care," "reasonable prudence," and similar terms have a relative significance depending upon the special circumstances and surroundings of the particular case.
>
> When a given state of facts is such that reasonable men may clearly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law, for the court.
>
> The running of a railroad train within the limits of a city at a greater speed than is permitted by the city ordinance is a circumstance from which negligence may be inferred in case an injury is inflicted upon a person by a train.
>
> In an action against a railroad company to recover for injuries caused by the negligence of its servants, the determination of the fact of whether the person injured was guilty of contributory negligence is a question of fact for the jury.
>
> In such case if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appears that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.
>
> In determining whether the injured party in such case was guilty of contributory negligence, the jury is bound to consider all the facts and circumstances bearing upon the question, and not select one particular fact or circumstance as controlling the case to the exclusion of all others.

In the courts of Pennsylvania, as well as in those of the United States, the trend of decision in the more recent cases is to the effect that, except in cases in which both the evidence and all inferences which may be drawn from it are but one way, the questions of negligence and contributory negligence are for the jury.

Esher *v.* Mineral R. & Min. Co., 28 Pa. Super. Ct., 387.

Kilkeary *v.* Thackeray, 165 Pa., 584.

Hogan *v.* West Mahony Tp., &c., Co., 174 Pa., 352.

Fetterman *v.* Rush Tp., 28 Pa. Super. Ct., 7.

In the present case the trial court withdrew the consideration of both questions from the jury on the ground that the proof disclosed negligence on the part of plaintiff's decedent which directly contributed to his own injuries. Yet it may well be doubted whether there was in truth any evidence at all in the case of negligence on the part of the deceased.

From the mere fact of the occurrence of injury, negligence is not to be presumed. The deceased, a sober and dependable man, fully qualified to perform the duties of his position in the defendant's employ, while endeavoring to perform such duties in a case where the defendant itself was clearly negligent, received the injuries which caused his death.

It does not appear from the evidence that in the course of performing the particular duty which was imposed upon him that he either did or omitted to do anything which the successful performance of that duty necessitated or did anything other than what the desire to successfully perform such duty required. To perform successfully the particular duty required of him necessitated his entering upon a most dangerous place, to go between and underneath the moving cars, to assume a cramped and unnatural position, and while maintaining it, and at the same time keeping pace with the

moving car, to raise and guide towards and into a narrow slot in the opposite drawhead an awkward and heavy iron bar. How was he to guide the bar into the opposite slot unless he raised his eyes, and under such circumstances how could he raise his eyes without elevating the crown of his head? In such circumstances, when the whole transaction was the work of a moment, how can he be charged with having acted with less circumspection than the exigency of the moment required?

Under the generally accepted principles governing the administration of such matters in the courts of Pennsylvania, the question of deceased's negligence ought in all fairness at least to have been left to the judgment of the jury. The refusal of the State court in this instance to conform to such established principles of administration savors of a disposition to evade and render innocuous the provisions of this most beneficent Federal statute.

Upon the whole case, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed and the cause remanded to that court with instructions to reverse the judgment of the court of common pleas of Jefferson county, Pennsylvania, and to remand the cause to that court with instructions to award a new trial.

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In the Supreme Court of the United States

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OCTOBER TERM, 1906

No. 41

CATHERINE SCHLEMMER, Plaintiff in Error,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY

In error to the Supreme Court of the State of Pennsylvania

PAPER BOOK OF DEFENDANT IN ERROR

C. H. McCAULEY,
M. E. OLMSTED,
A. C. STAMM,
Attorneys for Defendant in Error.

Pages.

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Supreme Court of the United States

October Term, 1906.

No. 41.

CATHERINE SCHLEMMER, *Plaintiff in Error,*

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

In error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR SUR MOTION TO DISMISS, AND UPON THE MAIN QUESTION.

No Federal Question Involved.

The plaintiff in error sued in the courts of Pennsylvania for damages for the death of her husband, Adam M.

Schlemmer, claiming the same to have resulted from the negligence of defendant in error. The law of Pennsylvania applicable to the case (Act of May 25, 1887, Laws of Pennsylvania, p. 271) requires that the Plaintiff's declaration in an action such as this "shall consist of a concise statement of the Plaintiff's demand." The statement filed by her appears at page 3 of the record and contains various allegations, as that her husband "was killed by reason of defendant's negligence" and "lost his life by reason of defendant's carelessness as shown by the following facts and circumstances" therein detailed. It raises no federal question whatever unless the same may be said to be raised in the language—

"Said coupler was not a legal coupler or coupling as required by existing laws on date—decedent's death viz. on August 5, A. D. 1900. Defendant was transporting said shovel car from Limestone in the State of New York through the State of Pennsylvania."

Whether the "existing laws" referred to were state, or federal laws, was not declared. No legal proposition was in said statement based upon the fact that "said coupler was not a legal coupler." No Act of Congress was mentioned or referred to, and no title, right, privilege or immunity claimed, under any statute of the United States. But the statement concludes that "on account of defendant's negligence and carelessness as aforesaid in causing the death of her said husband" the action was brought.

In the report of testimony the following occurs (Record, p. 16-17):

"Q. Mr. Coates, what kind of a coupling was that? Was it a safe coupling or a dangerous coupling, or what was it?

"A. It would just be according to how a man would go at to make the coupling.

"Q. How?

"A. It would just be according to how a man would go at to make the coupling. It would be dangerous in one way, and in another it would not.

"Q. Would you say as good as a safety coupler?

"A. Oh, no; no, sir.

"By Mr. Gordon: We object to that, and ask that it be stricken out.

"By the Court: They do not have to furnish the best appliances. They may furnish something that is reasonably safe.

"By Mr. Truitt: *We will come to this question that under the United States Statute they are required to furnish a safety coupler.*

"By the Court: I think it is not a question of comparison with a safety coupler.

"Q. Well, was it a safe coupler?

"A. No; it was not just exactly a safe coupling.

"Q. Wasn't it, Mr. Coates, a very dangerous coupling?

"A. Well, it was just according, I say, as how a man would go to make the coupling. I have made many such couplings myself, and I have seen a good many."

Surely that observation of counsel in the midst of the examination of a witness did not set up or claim any title, right, privilege or immunity under any statute. It did not even mention any particular statute, and even had counsel done so at that point and in that manner it would not have been a proper place or method of setting up and presenting to the court, for its determination, a Federal question.

At a later stage in the taking of testimony, as appears on page 53 of the Record, the following occurred:

"By Mr. Truitt: Plaintiff offers especially in this case the Statute of the United States relating to safety couplers. It was approved March 2nd, 1893, by the 52nd Congress, second session, chapter 196; and appears in the United States revised statutes, or Statutes at Large, Volume 27, page 532. *We plead this especially as part of the law in the case.*"

Again, that was not a proper time, place or method of setting up a Federal question. The mere offering of an Act of Congress in evidence and verbal statement of counsel that it is then and there pleaded "especially as part of the law in the case," amounted to nothing. The proper place to raise the question, in the first instance, was in plaintiff's statement. Even had that statement contained the language embodied in this offer of evidence, it would not have amounted to the raising of a Federal question within Section 709 of the Revised Statutes of the United States. The Act of 1893, which was thus offered in evidence, comprises eight sections upon different subjects. The mere statement that it is pleaded "especially as part of the law in the case" does not amount to a special claim of any particular title, right, privilege or immunity under the Act or any part of it, for no such title, right, privilege or immunity was mentioned at all, and no particular part or provision of the statute was mentioned or referred to as having any bearing whatever upon the case.

Upon the conclusion of plaintiff's testimony defendant moved for a compulsory non-suit upon the following grounds (Record, p. 53):

"First: That there is no proof of any negligence on the part of the defendant in this cause.

"Second: That the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam-shovel. That this omission was the fault of the deceased exclusively; and that deceased was guilty of contributory negligence and there can be no recovery in this case.

"Third: That under all the evidence in this case the verdict must be for the defendant."

Whereupon the court made the following order—

"By the Court: The motion of the defendant for a compulsory non-suit is sustained, and a non-suit is entered; with leave to the plaintiff within four days to make a motion to take it off."—(Record, p. 54.)

Plaintiff's counsel thereupon moved to take off the compulsory non-suit for the following reasons (Record, p. 9)—

"First. The Court erred in directing the Jury to render a verdict for the defendant.

"Second. The Court erred in ruling as a matter of law that the plaintiff was not entitled to recover in this case.

"Third. That the evidence showed that the decedent, Adam M. Schlemmer, was not negligent, and used all the care demanded by the circumstances.

"Fourth. That under the United States Statutes specially pleaded in this case, that the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler.

"Fifth. The evidence showed that the defendant company violated the law, and was, therefore, guilty of negligence and caused decedent's death.

"Sixth. That the evidence showed that the coupling which the decedent attempted to make was complicated, difficult and dangerous, and defendant company had neglected to instruct decedent as well as inform him of the nature thereof.

"Seventh. That the evidence disclosed that the car coupling in this case was out of date, more dangerous than the old link and pin coupling, and not a reasonably safe appliance.

"Eighth. That the evidence showed that the decedent attempted to make coupling with lantern lighted, and that it was a question for the Jury to determine whether decedent used ordinary care.

"Ninth. That the evidence of the experts showed that the shovel car in this case was the first car of this kind handled by them in many years of experience, that it had an unusual coupling, that it had no deadheads or bumpers

thereon, and that the defendant company accepting such a car thus equipped was guilty of negligence *per se.*"

(Note. These reasons, particularly the fourth and ninth, are not accurately quoted in the paper book of plaintiff in error.)

These reasons cannot be said to distinctly raise any particular federal question unless it was that under the U. S. Statutes referred to, but not mentioned in the fourth reason, "decedent was not deemed to have assumed the risk," owing to the fact that the car was not equipped with an automatic coupler. But the assumption of the risk was not one of the grounds defendant had asked for, and upon which the trial judge had granted, the compulsory non-suit. In his opinion refusing the motion to take off the non-suit the trial judge said (Record, p. 11)—

"The evidence showed that plaintiff's decedent, who was shown to have been a competent man in the position of brakeman, which he occupied and in which he had had considerable experience, attempted to make a coupling, which was shown not to have been complicated or difficult to understand, and of which said decedent undoubtedly had a thorough knowledge and comprehension, between one of the defendant's cars and a steam shovel or construction car, which was being conveyed by defendant company, for some private parties, from a point in the State of New York to one in this Commonwealth; that plaintiff's decedent, who could evidently see, and understand the said coupling as attached to the steam shovel, had his attention called thereto, and was directed as to his position in making use thereof twice by the conductor of his own train and of the switching engine crew, and within a very few minutes of the accident; and that in making said coupling, decedent, contrary to the instruction, immediately prior thereto given, raised his head too much, and because of that, as well as because of the irregularity or unevenness of the heights of the respective car and steam shovel, and

the absence of bumpers or deadwoods that would properly operate for the purpose of preventing that which actually happened, the decedent's head was crushed, resulting in his almost immediate death.

"The plaintiff's statement declares that the coupling of the steam shovel was exceedingly complicated and dangerous, and that decedent was not warned of said unusual and dangerous appliance, and by reason thereof the accident happened which resulted in the death of decedent.

"Plaintiff's testimony not only fails to sustain these charges but quite negatives them.

"That the coupling arrangement was not complicated was made very apparent by the testimony; that decedent was warned as to the danger and directed as to the manner of operation was conclusively proven; and that he attempted the act of making the coupling with a full knowledge of the danger seems to be beyond controversy. A citation of authorities is not necessary to show that the defendant company is not to be held for negligence because of the fact that it has undertaken to convey a steam shovel, equipped with a means of coupling which is not of the latest device, or even if it were dangerous, where the brakeman understood or was made aware of the difficulty or danger to be guarded against; nor if the injury was caused by the fault of the employee in taking unnecessary risks, or in failing to heed warnings or instructions, especially when given by his superiors whose duty it is to do so; nor by voluntarily placing himself unnecessarily in a dangerous position whereby he is injured."

The findings of the trial judge were manifestly justified by the evidence: thus, Mr. Coates, the yard conductor, plaintiff's first witness, said—

"I was there, and I seen he was too high. I seen what kind of a coupling it would be in that shape, and I told him to keep down.

"By Mr. Gordon:

"You told Mr. Schlemmer to keep down?

"A. I told Mr. Schlemmer to keep down. He had got down, but raised his head up, and I hollowed again." (Record, p. 17.)

And again—

"What caused this accident? What happened when he went to couple there?

"A. Well, he got his head too high."—(Record, p. 18.)

And again—

"Well, I have often seen cars a good bit that way, that a man had to keep down in under a car in order to make a coupling. I have often run across big cars that way that had bumpers on them, that were broken off in that same way. A man has to watch that, you know."—(Record, p. 19.)

And again—

"Q. And it was equipped with a single-pocket drawhead, was it?

"A. Yes, sir.

"Q. That was about the commonest coupler known prior to the introduction of the automatic, wasn't it?

"A. Yes, sir.

"Q. And it is very simple, isn't it?

"A. Yes, sir, it is.

"Q. And in order to couple the drawbar to this drawhead all that was necessary was to lift out the coupling pin, insert the end of the drawbar into the pocket, and drop the pin in?

"A. You would have to raise the draw-bar—

"Q. I mean in coupling the drawbar to the steam shovel?

"A. The drawbar stayed right in the drawhead, you know.

"Q. It was already coupled to the steam shovel?

"A. Yes, sir.

"Q. And that is all that was necessary to do in order to couple to the steam shovel?

"A. That was all; yes, sir.

"Q. Did it require any instructions to tell Mr. Schlemmer how to make this coupling; that is, did he know how to make the coupling?

"A. He knows how to make a coupling, I guess.

"Q. That is, he has had enough experience to know.

"A. Yes, sir, he has had experience enough to know.

"Q. All that was necessary to make the coupling to the caboose was to guide the free end of the drawbar into the slot in the knuckle?

"A. Yes, sir.

"Q. And Mr. Neilson had set the pin for him?

"A. Yes, sir, he had set the pin.

"Q. And there was nothing complicated about it?

"A. No.

"Q. The only danger that there was was that that would occur if he lifted his head too high?

"A. Yes, sir.

"Q. You say you notified him twice to keep down?

"A. Yes, sir.

"Q. Did he obey that word?

"A. He got down once, and then he got his head up too high again; and I hollowed at him, and it was too late.

"Q. If he had obeyed your instructions, Mr. Coates, this accident could not have happened could it?

"A. No, I do not suppose it would; it could not."—(Record, pp. 21-22.)

Mr. Schlemmer was an experienced brakeman and ordinary care on his part would have prevented the accident. (Record, pp. 29-30.)

Mr. Nielson, the freight conductor, who had charge of the train and of the crew, including Schlemmer, testified as follows (Record, p. 40):—

"Well we backed down within about three or four feet of the caboose, and Mr. Schlemmer said that he would enter this drawbar in that and drop the pin, and I told him I would set the pin and it would drop itself. I went in

and got the pin and set it, and I told him, when he went down under the car to take hold of this bar, to be sure and stay down low, so if he missed the coupling he would be in the clear so it would not catch him."

He testified that it was not a dangerous coupling to make. The following also appears in the testimony of this witness (Record, p. 45):

"Q. The coupling apparatus on the shovel car was the simplest kind known, wasn't it?
"A. Yes, sir.
"Q. And such as was familiar to every brakeman?
"A. Yes, sir.
"Q. There was nothing which required any instructions in making this coupling, except to keep down, was there?
"A. That was all.
"Q. Mr. Schlemmer knew how to make it, did he?
"A. Yes, sir.
"Q. You say that you warned him just before the coupling was made to keep down, to keep his head down, so if he missed the coupling he would miss the cars and not be pinched?
"A. Yes, sir.
"Q. Had he regarded your instructions would he have been injured?
"A. No, sir.
"Q. Then it was the disregard of the instruction given him by you that resulted in his death?
"A. Yes, sir.
"Q. How did the train come up, Mr. Neilson?
"A. It come back very easily.
"Q. Did it move the caboose at all?
"A. No, sir.
"Q. Who made the coupling afterward on this steam shovel?
"A. I did.
"Q. Did you have any difficulty with it?
"A. No, sir."

And again (p. 45)—

"If he had followed the instructions he would not have been hurt."

And again (p. 46)—

"Q. But it was the raising up in violation of your orders that caused his death, wasn't it?
"A. Yes, sir."

The trial judge having refused the motion to strike off the compulsory non-suit, upon request of plaintiff's counsel, made this entry—

"Plaintiff by her attorneys excepts to the refusal of the Court to set aside the non-suit in this case, and at their request a bill of exceptions is sealed as of July 21, 1902."

This was a general exception raising no federal question. Plaintiff thereupon appealed to the Supreme Court of Pennsylvania, and assigned the following errors (Record, p. 59) —

"I. The Court erred in refusing to set aside the non-suit in this case.
"II. The Court erred in not submitting the question of contributory negligence to the jury.
"III. The Court erred in holding that 'The shovel car was not a car used in interstate commerce or any other kind of traffic.'
"IV. The Court erred in holding that 'Plaintiff's decedent was guilty of negligence that contributed to his death.'
"V. The Court erred in holding that 'Contributory negligence will bar a recovery for an injury inflicted by defendant's negligence, which is the result of a failure to comply with statutory requirements."

These assignments of error constituted the pleadings upon

which the cause was heard in the Supreme Court of Pennsylvania.

"The assignments of error are an essential part of the pleadings in the Supreme Court, and as such should be so complete in themselves as not to require reference to the other parts of the record. Each specification should in and of itself present the question the Court is called upon to decide." *Landis* vs. *Evans, 113 Pa. 332.*

And see *Cessna's Estate, 192 Pa. 14; Irvin* vs. *Kutruff et al., 152 Pa. 609; Bull's Appeal, 24 Pa. 286.*

The assignments of error above quoted raise no Federal question whatever. They do not "specially set up or claim" any "title, right, privilege or immunity" under any Act of Congress. They do not even refer to any Act of Congress. The Act of Congress of 1893 was mentioned in the argument of the case, but the Supreme Court of Pennsylvania very properly refused to consider it upon the ground that no such question had been raised in the pleadings. The case was disposed of in a *per curiam* opinion, which, in its entirety, reads as follows (Record, p. 56):

"Whether the Act of Congress of March 2, 1893, (27 U. S. Stat. at Large 531) in regard to the use of automatic couplings on cars employed in interstate commerce, has any applicability at all in actions for negligence in the courts of Pennsylvania, is a *question that does not arise in this case,* and we therefore express no opinion upon it. The learned judge below sustained the non-suit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject."

In *Sayward* vs. *Denny,* 158 U. S. 180, on page 183, Mr. Chief Justice Fuller said:

"As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any State, was drawn in ques-

tion, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the State, in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed. And in that regard, certain propositions must be regarded as settled. 1. That the certificate of the presiding judge of the state court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to reexamine the judgment below. *Powell* v. *Brunswick County*, 150 U. S. 433, 439, and cases cited. 2. That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way. *Miller* v. *Texas*, 153 U. S. 535; *Morrison* v. *Watson*, 154 U. S. 111, 115, and cases cited. 3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. *Loeber* v. *Schroeder*, 149 U. S. 580, 585, and cases cited. 4. That the petition for the writ of error forms no part of the record upon which action is taken here. *Butler* v. *Gage*, 138 U. S. 52, and cases cited. 5. Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule. *Gibson* v. *Chauteau*, 8 Wall. 314; *Parmelee* v. *Lawrence*, 11 Wall. 36; *Gross* v. *U. S. Mortgage Co.* 108 U. S. 477, 484; *United States* v. *Taylor*, 147 U. S. 695, 700. 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt* v. *Sheldon*, 1 Black, 518; *Maxwell* v. *Newbold*, 18 How. 511, 515. 7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be

held to have disposed of such Federal question by its decision. *Powell* v. *Brunswick County*, 150 U. S. 400, 433."

In *Ansbro* v. *United States*, 159 U. S. 695, on page 697, Mr. Chief Justice Fuller said:

"The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case 'that involves the construction or application of the Constitution of the United States,' or 'in which the constitutionality of any law of the United States is drawn in question.' But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. *Borgmeyer* v. *Idler*, 159 U. S. 408; *Carey* v. *Railway Company*, 150 U. S. 170; *In re Lennon*, 150 U. S. 395; *Northern Pacific Railroad Company* v. *Amato*, 144 U. S. 465, 472; *Sayward* v. *Denny*, 158 U. S. 180. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and

rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

See also *Murdock* v. *City of Memphis*, 20 Wall. 590; *Detroit Railway Co.* v. *Guthard*, 114 U. S. 133; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291; *Loeb v. Trustees*, 179 U. S. 472.

It is already shown that plaintiff's statement filed in the trial court made no reference whatever to any federal statute or question and that was the place where, under the laws of Pennsylvania, its right, if it claimed any, should first have been set up.

In offering the act of March 2, 1893, in evidence and saying—"we plead this especially as part of the law in the case" (Record, p. 53), which was the first and only mention of any federal statute in the trial court, plaintiff's counsel certainly did not especially set up or claim any particular "title, right, privilege or immunity" under that statute. No right, title, privilege or immunity whatever was specified. The nine reasons for taking off the compulsory non-suit (Record, p. 9) are equally defective. But even if the offer of the statute in evidence and a general reference to the U. S. statute contained in one of the nine reasons for striking off the compulsory non-suit, be considered as setting up any distinct or definite right, that right was waived when on appeal to the Supreme Court of Pennsylvania, the errors assigned for the consideration of that court (Record, p. 59) omitted all reference to any federal statute or any federal question.

No federal question having been submitted to the Court of last resort of Pennsylvania that court properly held that any question with reference to the act of March 2,

1893, "is a question that does not arise in this case," and its decision sustaining the compulsory non-suit ordered by the trial judge on the ground of the contributory negligence of the deceased, is not reviewable in this court.

THE STATE COURT HAVING DECIDED THE CASE UPON THE GROUND OF CONTRIBUTORY NEGLIGENCE, WHICH DOES NOT PRESENT A FEDERAL QUESTION, ITS JUDGMENT WOULD NOT BE REVIEWABLE HERE EVEN THOUGH ANOTHER ISSUE, PRESENTING A FEDERAL QUESTION, HAD BEEN SQUARELY RAISED.

Even though a federal question had been squarely raised in the Supreme Court of Pennsylvania, nevertheless, as the defence of contributory negligence was found by that court to be a complete defence, it would have been unnecessary for it to pass upon the federal question and its failure to do so could not have been assigned as error here.

In *Adams County* v. *Burlington & Missouri R. R. Co.*, 112 U. S. 123, this court distinctly laid down the law which is thus stated in the syllabus:

"When a record shows that two questions are presented by the pleadings, one federal and one non-federal, and that the judgment below rested upon a decision of the non-federal question, this court has no jurisdiction to review that judgment."

To the same effect are *Chouteau & Another* v. *Gibson*, 111 U. S. 200; *Murdock* v. *Memphis*, 20 Wall. 590, 636.

In *Jenkins* v. *Loewenthal*, 110 U. S. 222, the law is thus stated in the syllabus:

"When the record discloses two defences to an action brought in a State court, one presenting a federal question, and one presenting no federal question, either of

which if sustained was a complete defence to the suit, and that the State court gave judgment in favor of the defendant on both, and the cause is brought here by writ of error, this court will affirm the judgment below without considering the federal questions."

In *Hale* v. *Akers, 132 U. S. 554*, it was held that where the Supreme court of a State decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed, without considering the federal question. On page 564, Mr. Justice Blatchford said:

"After contending that the court below erred in its decision of the Federal question; that such decision was based upon the facts (1) that the land in dispute was a portion of the pueblo land, and (2) that the lines of the survey of the Huichica grant did not conform to the decree of confirmation; and that, in so doing, the court ignored (1) the power of the Mexican government to divest the pueblo title, and (2) the findings of the lower court that the survey did conform to the decree; the plaintiffs urge that the interpretation by that court of the agreement between Schell and Akers was incorrect, and that it would not have so interpreted the agreement had it not been for its erroneous deduction of law regarding the Federal question, and, therefore, that the decision of the Federal question was the controlling decision of the case.

"But we cannot take this view. Both of the courts below decided that, irrespective of the Federal question, the agreement of October 11, 1860, was decisive of the case. The construction of that agreement involved no Federal question, and controlled the whole case.

"In *Murdock* v. *City of Memphis,* 20 Wall. 590, 636, this court announced, as one of the propositions which flowed from the provisions of the second section of the act

of February 5, 1867, 14 Stat. 386, embodied in section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a Federal question was erroneously decided against the plaintiff in error, the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

"This principle has since been repeatedly applied. In *Jenkins* v. *Lowenthal,* 110 U. S. 222, where two defences were made in the state court, either of which, if sustained, barred the action, and one involved a Federal question and the other did not, and the state court in its decree sustained them both, this court said that, as the finding by the state court of the fact which sustained the defence which did not involve a Federal question was broad enough to maintain the decree, even though the Federal question was wrongly decided, it would affirm the decree, without considering the Federal question or expressing any opinion upon it, and that such practice was sustained by the case of *Murdoch* v. *City of Memphis, supra.* See, also, *McManus* v. *O'Sullivan,* 91 U. S. 578; *Brown* v. *Atwell,* 92 U. S. 327; *Citizens' Bank* v. *Board of Liquidation,* 98 U. S. 140; *Chouteau* v. *Gibson,* 111 U. S. 200; *Adams County* v. *Burlington & Missouri Railroad,* 112 U. S. 123; *Detroit City Railway* v. *Guthard,* 114 U. S. 133; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18; *De Saussure* v. *Gaillard,* 127 U. S. 216, 234.

"It appears clearly from the opinion of the Supreme Court that it was not necessary to the judgment it gave that the words 'taking the direction of the Arroyo Seco' should be construed at all. It is, therefore, of no consequence whether or not that court was wrong in its conclusions as to the meaning of the Huichica grant."

See *Detroit Railway Co.* v. *Guthard,* 114 U. S. 133;

N. O. Waterworks v. *La. Sugar Company,* 125 U. S. 18; *De Saussure* v. *Gaillard,* 127 U. S. 216-233.

In *Eustis* v. *Bolles,* 150 U. S. 361-366, Mr. Justice Shiras, delivering the opinion of the court, said—

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

In *Rutland Railroad* v. *Central Vermont Railroad,* 159 U. S. 630, on page 640, Mr. Justice Gray said:

"It is well settled, by a long series of decisions of this court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question."

In *Israel* v. *Arthur,* 152 U. S. 355, the Supreme Court held that it had no jurisdiction to revise the decision of the highest court of a state, in an action at law, upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way.

The trial judge having declared that upon plaintiff's own evidence she was not entitled to recover because of the contributory negligence of the deceased; and the Supreme Court of Pennsylvania having affirmed the judgment upon that ground alone, there is nothing to which the jurisdiction of this court can attach.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE ARE SEPARATE AND DISTINCT DEFENSES—THE ACT OF 1893 RELATES TO THE FORMER ONLY—IT DOES NOT TAKE AWAY THE LATTER.

The 8th section of the Act of Congress of March 2, 1893, (27 Stat. L., 531) declares

"That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act, *shall not be deemed thereby to have assumed the risk* thereby occasioned, although taken in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Under the law of Pennsylvania, plaintiff would not be entitled to recover in this case even if the deceased had not been guilty of contributory negligence, because it is the well settled law of that State that an employe assumes the risks incident to the discharge of his duties, even though those duties are hazardous, if he has had an opportunity to ascertain their dangerous character. *Patterson* vs. *R. R. Co., 76 Pa. 389; Pgh. & Connellsville R. R. Co.* vs. *Sentmeyer, 92 Pa. 276.*

In the latter case Gordon, J., delivering the opinion, said (p. 280):

"The servant, or employe, assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. Furthermore, the master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty."

To the same effect are *Moore* vs. *Penna. R. R. Co., 167 Pa. 495-497; Auburn* vs. *Tube Works Co., 14 Superior*

Court, 568-570; Rooney vs. *Carson, 161 Pa. 26-27; Bemisch* vs. *Roberts, 143 Pa. 1.*

If the Act of 1893 applied to this case at all, it simply took away from defendant that single ground of defence, namely, the assumption of risk by the employe. But the Act in no way interferes with, touches or relates to, the defence of contributory negligence. That is left precisely as it was before the Act of 1893 was passed.

If an employee of a common carrier should place his neck upon the track in front of a moving train and thereby lose his life, would the Act of 1893 permit or authorize a recovery, upon proof that the train, or locomotive, or car, which cut off his head was not equipped with automatic couplers? If contributory negligence would be a bar to recovery in that extreme case, then in what case of clear contributory negligence would it not be a bar? Defendant was successful in the State courts, not upon the defence of assumption of risk, by the deceased, but upon the ground of contributory negligence. Plaintiff's counsel confuses these two grounds of defence, which are separate and distinct, not related to, nor dependent upon, each other.

It is a rule of universal application, sustained by hundreds of decisions, that recovery by a plaintiff is precluded where his or her own negligence has proximately contributed to his or her own injury. It is sufficient to refer to *Washington & Georgetown R. R. Co.* vs. *McDade, 135 U. S., 554; 7 Am. & Enc. of Law, 371, Sunney* vs. *Holt, 15 Fed. Rep., 880; Motey* vs. *Pickle M. & G. Co., 74 Fed. Rep., 155.*

Although under the Act of 1893, where applicable, an employe will not be deemed to have assumed the risk of the employment, nevertheless he must act in such manner that injury shall not befall him as the result of his own fault or imprudence. The distinction between "assumption of risk"

and "contributory negligence" has always been clearly drawn.

In *Union Pacific Ry. Co.* vs. *O'Brien 161 U. S., 451-456,* Chief Justice Fuller, delivering the opinion of this court said:

"That the second instruction was properly refused because it confused two distinct propositions, that relating to the risks assumed by an employe in entering a given service and that relating to the amount of vigilance that should be exercised under given circumstances."

In *Choctaw, Oklahoma R. R. Co.* vs. *McDade, 191 U. S., 64,* Mr. Justice Day, delivering the opinion of this court, said:

"The question of assumption of risk is quite apart from that of contributory negligence."

In *Narramore* vs. *Cleveland C. C. & St. L. Ry. Co. (C. C. A., Sixth Circuit), 96 Fed. Rep. 298-304,* these two grounds of defence were considered and discussed by Taft, Circuit Judge, who said:

"The Knisely case, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employees worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or non-action in disregard of personal

safety by one who treating the known danger as a condition, acts with respect to it without due care of its consequences."

Again, on the same page:

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences."

In *St. Louis Cordage Co.* vs. *Miller,* 126 Fed. Rep., 495, (C. C. A. 8th Circuit), Circuit Judge Sanborn very fully discusses the distinction between assumption of risk and contributory negligence. On page 502 he says:

"The truth is, that while assumption of risk and contributory negligence both apply to prevent a recovery in cases in which the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur, they are neither identical in effect nor coincident in extent, and the latter has no application and constitutes no defence in that great majority of cases in which assumption of risk is an impregnable bar to a recovery where prudent persons assume the obvious dangers of their employments which are neither imminent nor great. Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort. Contributory negligence is no element or attribute of assumption of risk. The latter does not prevail because the servant was or was not negligent in making his contract

and in exposing himself to the defect and danger which injured him, but because he voluntarily agreed to take the risk of them. No right of action in his favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from.

"This clear distinction between assumption of risk and contributory negligence has been repeatedly announced and constantly maintained in the federal courts and in most of the courts of the States. The law upon this subject which controls this case and all cases of this character in the federal courts is stated in *Washington, etc., R. R. Co.* v. *McDade,* 135 U. S., 554, 570, 10 Sup. Ct, 1044, 34 L. Ed., *235,* in the quotation which follows, and so far as our investigation has extended, the rules of law thus announced have never been disregarded or modified by that court in any subsequent decision:

" 'Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances, for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been known to him, and was unknown to the employee or servant. But if the employee knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And further, if the employee himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is

guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer.'

"Here the two defences of assumption of risk and contributory negligence are separately stated and the first failed because the servant 'did not know that the belt in which he was caught had been recently and perhaps imperfectly repaired,' and 'was wholly unaware of the danger attendant upon putting on the belt by hand,' while the defence of contributory negligence failed because the defendant failed to satisfy the jury that the servant was not exercising ordinary care in placing the belt upon the pulley."

Again on page 505 he says:

"The unavoidable logical deduction from the principles and decisions to which we have adverted is that assumption of risk and contributory negligence are distinct and independent defences, that the former rests in contract and upon the maxim, *Volenti non fit injuria,* and is not conditioned or limited by the probability or improbability, the imminence or the remoteness, of the danger from the risk assumed, or by the existence or by the absence of contributory or other negligence on the part of the party who undertakes to assume the risk, while contributory negligence is founded upon an absence of ordinary care which causes or contributes to the injury which is the basis of the suit. This conclusion is fortified by the numberless decisions in which the defence of assumption of risk has been sustained in which the plaintiffs were not guilty of contributory negligence, cases in which prudent persons in the exercise of ordinary care would have assumed and ordinarily did assume the very risks which were the subjects of the actions."

In *Hesse* v. *R. R. Co.*, 58 Ohio St., 167, the Supreme Court said:

"Acquiescence with knowledge, is not synonymous with contributory negligence. One having full knowledge of de-

fects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten."

In *Miner* v. *Railroad Co.*, 153 Mass., 398, the distinction was recognized in holding that where a plaintiff was guilty of no contributory negligence, nevertheless he might be barred from a recovery by assumption of the risk.

In *Cleveland, C. C. & St. L. Ry. Co.* v *Baker,* (C. C. A., 7th Circuit), 91 Fed. Rep., 224, the distinction is sharply drawn and flatly recognized.

Since, then, "assumption of risk" and "contributory negligence" are separate and distinct matters, the provision in the Act of 1893 that no employee of a common carrier, who may be injured by any car in use contrary to the provisions requiring automatic couplers, shall be deemed to have assumed the risk occasioned thereby, can have no effect on the general principle of law that recovery by a plaintiff is precluded where his own negligence has proximately contributed to and, as in this case, caused his own injury. Not only is this the conclusion that must be drawn from the principles stated, but the courts, in many decisions, have held this to be the law. With the exception of two or three decisions by a divided Supreme Court of North Carolina, all the cases hold that where the plaintiff was contributorily negligent, he cannot recover even though the defendant was disregarding statutory requirements.

In *Winkler* vs. *Phila. & R. R. Co.,* 53 Atl. Rep., 90, this question was squarely presented to the Superior Court of Delaware. Winkler had been injured by coupling cars not automatically equipped, as required by the Act of Congress of 1893. Whether or not he had himself been negligent was a disputed question. The court held that if he had himself been negligent he could not recover, although the company had violated the Act of 1893 by not

having its cars equipped. Lore, C. J., delivering the opinion said:

"If at the time of the accident, the defendant was using such a coupler, which was prohibited by the Act of Congress, it was guilty of negligence per se; and, if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and, if not so equipped, the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge. If, however, in using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he cannot recover, notwithstanding the fact that the coupling was unlawful. In such case he must take the consequences of his own contributory negligence." * * * * "It is the duty of the servant, as well as of the master, to exercise care and prudence in all cases commensurate with the risk or danger of the employment. Therefore, if the plaintiff contributed to the accident by his own negligence, he cannot recover. Where contributory negligence is relied on as a defence, however, the burden of proving such negligence is upon the defendant."

This case was affirmed in the Supreme Court of Delaware, June 19, 1903, 56 Atl. Rep. 112, Boyce, J, at the close of the opinion said:

"If at the time of the accident, the defendant was using such a coupler, which was prohibited by the Act of Congress, it was guilty of negligence per se; and, if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and, if not so equipped, the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge.

"We are of the opinion that the judgment of the court below should be affirmed."

In *Cleveland C. C. & St. L. Ry. Co.* v. *Baker,* (C. C. Appeals, 7th Circuit), 91 Fed. Rep., 224, a brakeman was injured by reason of the cars not being equipped with grab-irons as required in Section 4 of the Act of 1893. The Court held that if the brakeman was guilty of contributory negligence, he could not recover. On page 228, Circuit Judge Woods said:

"We are of opinion that this question is substantially the same as if the railroad companies voluntarily and without legislative requirement had been accustomed to use grab-irons, and cars without them were known to be defective, and correspondingly more dangerous to one attempting to couple or uncouple them. The meaning of the act is that, by remaining in his employment, the servant does not assume the risks generally incident to the absence of such irons, but not that in a particular case of voluntary action, with full knowledge of the situation, the character of the act is not to be determined according to all the facts and circumstances. The known absence of the grab-irons was a circumstance in this case which the jury should have been directed to consider in determining whether the defendant in error was guilty of contributory negligence, or intended to assume the risk of the attempt to uncouple. A contrary construction of the act would permit a brakeman to take the risk of coupling or uncoupling cars not supplied with hand holds under circumstances of extreme and well understood danger, with the conscious purpose of holding the company for the result."

This precise question is clearly decided in *Denver & R. G. R. Co.* v. *Arrighi,* 129 Fed. Rep., 347, (C. C. A., 8th Circuit). Arrighi had his hand smashed in coupling cars engaged in interstate commerce, which cars were not provided with automatic couplers as required by the Act of 1893. He did not deny his contributory negligence, and

rested his whole case on the failure of the railroad company to provide automatic couplers. Circuit Judge Hook, delivering the opinion, said (p. 347):

"The trial court denied a request of the defendant that the jury be instructed to return a verdict in its favor for the reason that the plaintiff was guilty of negligence contributing to his injury. The action of the Court in that respect is assigned as error. Prior to the time when the Act of Congress became fully operative, the employees of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common law doctrine of assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employees shall no longer rest under the burden of that assumption in respect of any car used contrary to its provisions. While this is true, the railroad company is not thereby deprived of the defence of contributory negligence. With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employee are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employee by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employee himself. The rationale of the doctrine of assumption of risk, is not that which supports the rule of contributory negligence. They operate differently and are dependent upon widely different principles. It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defence of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements."

The Act of March 23, 1888, (85 Ohio Laws, p. 105), required every railroad company to adjust, fill or block the frogs, switches, and guard rails on its tracks, and provided a penalty for failure so to do. The Cleveland, C. C. & St. L. Ry. Co., did not comply with the provisions of the statute, and as a result of such failure Marramore was injured. In his suit, he relied on the failure of the railroad company to comply with the statute. The case is reported in 96 Fed. Rep. 298, (C. C. of Ap., 6th Circuit). Circuit Judge Taft, delivering the opinion, said (p. 304):

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defence to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of Krause v. Morgan, 53 Ohio St. 26, 40 N. E. R. 886, where the employee, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from danger. In Railway Co. v. Craig, 19 C. C. A. 631, 73 Fed. Rep. 642, we held that the Krause Case was one of contributory negligence, and followed it as such. The syllabus confuses the difference between the assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The fol-

lowing cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: Coal Co. v. Estievenard, 53 Ohio St., 43; Coal Co. v. Muir, 20 Col. 320; Holum v. Railway Co., 80 Wis. 299; Grand v. Railroad Co., 83 Mich. 564; and Taylor v. Manufacturing Co., 143 Mass. 470. In the last two cases the distinction between contributory negligence and assumption of risk is clearly referred to.

"For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant company to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom."

Lake Erie & W. Ry. Co. v. *Craig*, 73 Fed. Rep., 642, is another case based on a violation of the Ohio Statute (named in the preceding case), requiring frogs to be blocked. Circuit Judge Taft on page 643 says:

"The liability of the defendant railway company was asserted by the plaintiff on the ground that it had failed to block a railway frog in its yard at Lima, in violation of a statute of Ohio passed March 23, 1888 (85 Ohio Laws, 105), requiring all railway corporations operating railways in the state to block or fill such frogs, for the safety of their employees, and imposing a punishment for failure to do so. We have already held, in Railroad Co. v. Van Horne, 16 C. C. A. 182, 69 Fed. Rep. 139, that the effect of this statute is to make a failure by a railroad company to comply with it negligence, as a matter of law. This is the ruling of the supreme court of Ohio in construing an analogous statute enacted to compel mine owners to adopt safety appliances for their employees. Krause v. Morgan (Ohio Sup.), 40 N. E. 886. The statute does not, however, prevent the master, in such cases, from escaping liability, if the employee injured by the master's non-compliance with the

statute is himself guilty of contributory negligence. This is expressly ruled by the supreme court of Ohio in the case cited, where, after an elaborate review of the authorities in other states, Judge Speer, speaking for the court, sums up its conclusions as follows:

" 'While the statute, as we construe it, does not make the operator of the mine absolutely liable to a party injured by an explosion of gas, where the operator has not complied with the statute, such conduct is negligence per se, and the employer cannot escape liability by showing that he took other means to protect the workmen, equally efficacious. Proof of failure to obey the statute is all that is necessary to establish negligence on the part of the operator, but the statute does not change the well-established rule that, where one has been guilty of negligence that may result in injury to others, still the others are bound to exercise ordinary care to avoid injury.' "

In *Hodges* v. *Kimball;* 104 Fed. Rep., 745, handholds or grab-irons were not provided as required by Section 4 of the Act of Congress of 1893. It was held that this neglect of statutory duty did not preclude the defence of contributory negligence. On page 752, District Judge Purnell said:

"The absence of the handholds or grab-irons does not appear in any sense to have been the proximate cause of the injury. The evidence is that these irons were missing from the opposite side of the car from which decedent entered If they had been on the car on that side, they could not have aided him. The Act of Congress, which is not referred to in either brief or invoked by the plaintiff, requires railroads doing interstate commerce to provide handholds or grab-irons in the ends and sides of freight cars (27 Stat. 531), but a failure to provide such grab-irons does not excuse a brakeman from a failure to use ordinary prudence in a particular case, where he observes the absence of such appliances; nor does this act change the rule as to the liability of the master where the failure to comply with the statute was not the cause of the injury."

In *Dixon* v. *Western Union Tel Co.*, 68 Fed. Rep., 630, the law is thus stated in paragraph 3 of the syllabus:

"The statute of Indiana (Act March 4, 1893) providing that 'every * * * corporation * * * shall be liable in damages for personal injury suffered by an employee while in its service * * * where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporationfi or in obedience to the particular instructions given by any person delegated with the authority of the corporation, * * *' does not impose liability upon the employer for injuries resulting from the act or omission of the person injured."

That a violation of statutory duty does not preclude the defence of contributory negligence, is held by the Supreme Court of Vermont, in *Kilpatrick* v. *Grand Trunk Rwy. Co.*, 27 Am. & Eng. R. R. Cases, annotated, 945. A ladder was maintained on the side of a car contrary to statute, and a switchman while using it was knocked off. On page 952, Stafford, J., said:

"Yet it does not follow that an employee who is injured by reason of the neglect of his employer to comply with the statute, can recover under all circumstances. By the language of the statute, the right to recover is limited to injuries 'resulting from such neglect;' and, as this court has once decided in this very case, that means resulting from such neglect alone; and the plaintiff must, as in other actions of this character, show that his own negligence did not contribute to the injury. But the doctrine of contributory negligence is entirely separate and distinct in theory from the doctrine of assumption of risk, although, as a practical matter, the fact that the employee knew and appreciated the risk he was running may, in the circumstances, justify or even require a finding that he was guilty of contributory negligence; or the negligence may consist entirely in the manner in which the risk is met. To speak concretely, take this very case, the use of a side ladder. They had been

used by employees for years, and doubtless by such use the risk had been assumed. Now, by reason of the statute, the risk is not, and cannot be assumed. Yet the use of it, under the given circumstances, may be negligence, and may even be so gross as to be negligence as matter of law. The defendant here claimed that the plaintiff was guilty of contributory negligence as matter of law, and based the claim mainly upon the ground that the plaintiff knew the location of the post and the track, their nearness to each other, and the consequent danger to one riding by the post on a side ladder. The plaintiff admitted that he knew the location of the post and the rail in a general way, but denied that he knew the distance between the two, and testified that before the accident he did not know of any reason why one could not ride safely by the post on a side ladder; that he had never tried it or seen it tried, although he had ridden safely past other posts in the yard * * * Upon this testimony we are asked to say as matter of law that the plaintiff was guilty of contributory negligence. We think it was a question for the jury."

The above case was before the Supreme Court of Vermont twice, the first case being reported in 20 Am. & Eng. R. R. Cases, annotated, 300. The law as stated there in the syllabus is,—

"That an instruction that the question of contributory negligence was not in the case was erroneous, since defendant's neglect to perform its statutory duty did not relieve plaintiff from proving that his own negligence did not contribute to his injuries."

In *Mobile J. & K. C. R. Co.* v. *Bromberg,* 37 Am. & Eng. R. Cases, annotated, 823, (Supreme Court of Alabama), a brakeman was injured coupling cars not provided with automatic couplers. The tenor of the whole case shows that contributory negligence, if established, is considered a good defence.

In *Hollum* v. *Chicago, Milwaukee & St. Paul Rwy. Co.,*

80 Wis., 299, the law is thus stated in paragraph 2 of the syllabus:

"Ch. 123, Laws of 1889, requiring every railroad company to erect and maintain guards or blocks at every frog, and providing that the company shall be liable for all damages sustained by reason of its failure to do so, whether the person injured be an agent or servant of the company or not, and notwithstanding such failure may occur through the negligence of any other agent or servant thereof, does not take away the defence of contributory negligence."

In *Victor Coal Co.* v. *Muir,* 20 Col., 320, a statute required mine owners to securely prop dangerous places in mines. The mine owners neglected to do so, and Muir continued to work in what he must have known was an exceedingly dangerous place. He was injured by falling rock, and sued for damages. It was held that though the company violated the statute in not propping at this particular place, yet the plaintiff's continuing to work in the place, with the loose rock in full view, was such contributory negligence as to bar him from a recovery.

A statute of Massachusetts requires all openings of elevators and well holes upon every floor of a factory to be protected in a manner specified, and that any corporation shall be liable for all damages suffered by any employee by reason of a violation of the statute. In *Taylor* v. *Carew Manufacturing Company,* 143 Mass., 470, it was held that notwithstanding the failure of the company to provide guards according to the statute, the plaintiff having been negligent, he could not recover.

A Michigan statute requires railroad companies to adjust, fill, or block the frogs, switches, and guard rails on their roads in such manner as to prevent the feet of employees from being caught therein. In *Grant* v. *Mich. Cen.*

R. R. Co., 83 Mich., 564, the law is thus stated in paragraph 3 of the syllabus:

"The failure of a railroad company to comply with the provisions of said act will render it liable to an employee who is thereby injured, in a case where the law applies, *if he is not himself guilty of negligence.*"

A statute of Mississippi requires that railroad trains shall not run at a greater speed than six miles per hour through towns and cities, and provides, further, that the company shall be liable for any damages or injury which may be sustained by any one from trains while running at a greater speed than six miles.

In *Vicksburg & Meridian R. R. Co.* vs. *McGowan*, 62 Miss. 682, a case in which an injured party was trying to recover damages because the train which injured him was running more than six miles an hour, while in a town, the Supreme Court, Campbell, C. J., delivering the opinion, said on page 694:

"We hold the law to be that, even where a railroad company violates the statute under consideration, one who could by the exercise of ordinary care avoid injury from the act of the company cannot recover for such injury.

"There is in the books much confusion on the subject of contributory negligence. The principle on which the doctrine rests is that the plaintiff cannot recover for the negligence of another if, by ordinary care, he could have avoided injury from such negligence. Contributory negligence is the want of ordinary care to avoid injury from the act of another. One must use due diligence or ordinary care to avoid injury from another, failing in which he may not recover for what by such diligence or care he might have avoided. Whether in any case the plaintiff used the requisite care to avoid injury depends on the circumstances in which he was called on to act.

"One who contributes directly to his own injury, by a failure to exercise the ordinary care which would have saved

him from harm from the negligence of another, is denied the right to recover, because the law will not undertake to apportion the blame between parties mutually in fault.

"In this case the plaintiff was on the track of the defendant when he was struck by a locomotive and injured. Although he may have been improperly on the track where he was, and although the defendant may have been a wrongdoer by violating the statute as to the rate of speed, the plaintiff is not entitled to recover, if notwithstanding the wrong of the defendant, he could by ordinary care have avoided injury from the act of the defendant."

In *Mobile & Ohio R. R. Co.* vs. *Stroud,* 64 Miss. 784, in a similar case, Mr. Justice Arnold, on page 792, said:

"A man who voluntarily gets on a railroad track, sixty feet in front of a train moving toward him at a greater rate of speed than six miles an hour, at a point where there is nothing to obstruct the view or prevent him from seeing the train or leaving the track after he is on it, must take the consequences of his own negligence and folly. If injured by the train, under such circumstances, he is not more sinned against than sinning. He does not exercise reasonable or ordinary care. He cannot speculate or experiment, in such manner, with safety, on the chances of others being more prudent than himself, or of others taking better care of him than he does himself. The negligence of the railroad company in running its train at an unlawful rate of speed, was no excuse for the negligence of the deceased.

"It was decided in V. & M. R. R. Co. v. McGowan, 62 Miss. 682, that section 1047 of the code, which prohibits locomotives and cars from being run through towns, cities, and villages, at a greater rate of speed than six miles an hour, does not impose absolute liability on a railroad company for an injury done while the statute is being violated, without regard to the conduct of the person injured or the circumstances under which the injury occurred, and that even where a railroad company violates the statute, one who could by the exercise of ordinary care avoid injury by the act of the company, cannot recover for such injury."

In *Railroad Co.* vs. *Brooks*, 85 Miss., 269, in another similar case, Mr. Justice Trully, on page 274, said:

"That the employees of appellant were guilty of negligence is manifest. To run an extra freight train, at an unusual time, through a thickly settled part of a town, at a rapid rate of speed, in the night time, over frequented street crossings, and without giving any signal or ringing any bell, must assuredly be deemed negligence. The appellee did not insist, nor did the court instruct, that such acts on the part of the railroad employees was gross negligence, but allowed the jury to pass on the question of whether the conduct of Brooks, the injured party, as disclosed by the testimony, was such as to constitute, under the circumstances of this case, contributory negligence. Manifestly, appellant has no ground of complaint on this score. It is contended that the facts of the case show beyond dispute that Brooks, the person injured, was guilty of such recklessness as to preclude recovery by appellee. But the conduct of Brooks at the time of the injury was of itself a controverted fact, and this and all other controverted facts must be submitted to the jury. This was done by the trial judge, and their determination was adverse to the contention of appellant. The jury, upon disputed facts, guided by fair and accurate instructions, having found that the negligence of appellant was the proximate cause of the injury, and there being some testimony to sustain that finding, we must decline on this ground to reverse the judgment, even though it may be granted that the question was one of doubt."

Section 193 of the Constitution of 1890, of Mississippi, provides that knowledge by employees of the defective or dangerous condition of machinery or appliances shall not be a defense, to a railroad company in any action for injuries caused thereby. It was held in *Buckner* vs. *Railroad Co.*, 72 Miss., 873, that this did not preclude the defense of contributory negligence. On page 877 Mr. Justice Campbell said:

"The averment of the declaration that the hand-car furnished him by his employer was defective in having a lever that made its operation dangerous to persons on it, and a broken wheel which led to serious consequences, and that these defects were the direct and immediate cause of the injury to the plaintiff, of which he complains, makes it sufficient to withstand a demurrer, although the declaration does not negative contributory negligence by the plaintiff, the rule in this State being that this defense is to be made by the defendant, unless it arises out of the case made by the plaintiff.

"The declaration shows that the plaintiff had knowledge of the defects in the hand-car, but the constitution of 1890 declares that knowledge by an employee of the defective or unsafe character or condition of any machinery shall be no defense, etc., section 193. The effect of this is not to destroy the defense of contributory negligence by a railroad company, but merely to abrogate the previously existing rule that knowledge by an employee of the defective or unsafe character or condition of the machinery, ways or appliances, shall not, of itself bar a recovery. The law was that knowledge by an employee of defective appliances which he voluntarily used, precluded his recovery for an injury thus received. The Constitution destroys that rule, and the mere fact that the employee knew of the defect, is not a bar to recovery; but knowledge by an employee of defects is still an element or factor, and a very important one, in determining whether, with the knowledge he had, he used that degree of caution required in his situation with reference to the appliances causing his injury. The Constitution did not have the effect to free employees of railroad companies from the exercise of ordinary caution and prudence. It does not license recklessness or carelessness by them, and give them a claim to compensation for injuries thus suffered. They, like others not employees, must not be guilty of contributory negligence, if they would secure a right of action for injuries. The fact of knowledge of defects shall not be, as heretofore, a defense, but the same rule that applies to others applies to them. They must use the degree of caution applicable to the situation, for the absence of this is negligence, and, if it contributed to the injury, no recovery

can be had by an employee any more than by one not an employee."

THE INTERSTATE COMMERCE COMMISSION CORRECTLY INTERPRETING THE ACT OF 1893, NOTIFIED THE RAILWAY EMPLOYEES THAT SECTION 8 WOULD NOT RELEASE THEM FROM RESPONSIBILITY FOR THEIR OWN CONTRIBUTORY NEGLIGENCE.

That the construction placed upon the Act of 1893 by the Interstate Commerce Commission is in harmony with the principles laid down in the above cited cases is manifest from the following paragraph copied from page 84 of the printed copy of its Fourteenth Annual Report, dated December 24, 1900, and signed by every member of the Commission, viz:

"It may well be repeated that a large number of the accidents to employees can only be attributed to carelessness.

"Impressed with the necessity of particularly directing the attention of the employees to this subject, the secretary of the Commission addressed a letter to the subordinate branches of various railway organizations calling attention, among other matters, to the necessity of greater care and caution on the part of railway employees in the discharge of their duties. It was also stated to be the understanding of the Commission that Section 8 of the act does not fully release them from responsibility for contributory negligence."

THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE WAS CORRECTLY APPLIED BY THE PENNSYLVANIA COURTS IN THIS CASE.

The ruling of the Pennsylvania courts upon the question of contributory negligence is not reviewable here, it not presenting a Federal question. In any event, it is in entire harmony with the rulings of this and all other courts.

In *Wash. & Georgetown R. R. Co.* vs. *McDade,* 135 U. S., 554, this court held, as appears from the syllabus, that—

"When a person employed by another to labor in connection with machinery, is wanting in such reasonable care and prudence as would have prevented the happening of an accident and is injured by the machinery, he is guilty of contributory negligence, and his employer is thereby absolved from responsibility for the injury, although it was occasioned by defect in the machinery and through the negligence of the employer."

In *Southern Pac. Co.* vs. *Seley,* 152 U. S., 145, this court held, as appears from the syllabus, that—

"After serving as a brakeman in the employ of a railroad company, S. became a conductor on the same railroad, and as such had been engaged at a depot yard at one of its stations at least once a week, and usually oftener, for seven years. While making up his train at that yard, preparatory to running out with it, after the chief brakeman had failed in an attempt to make a coupling he tried to make it. There was an unblocked frog at the switch where the car was. He put his foot into this frog, and was told by the brakeman that he would be caught if he left it there. He took it out, but put it in again, and, being unable to extricate it when the cars came together, he was thrown down and killed. In an action brought by his administratrix against the railroad company to recover damages, *held,* that S. must be assumed to have entered and continued in the employ of the railroad company with full knowledge of any danger which might arise from the use of unblocked frogs; that he was guilty of contributory negligence; and that the company was entitled to a peremptory instruction in its favor."

In the case at bar Schlemmer at first obeyed the instruction to keep his head down, but afterwards raised it into a position of danger, and thus brought on his own death. Moreover, he violated absolutely a rule of the company which required him to use a stick in making the coupling.

In the testimony of plaintiff's first witness this passage appears (Record, p. 23):

"Q. Two men with a stick extending through between the cars could have lifted that bar up, and inserted the pin?
"A. Yes, sir, they could.
"Q. And you say there was a rule of the road requiring men to do that?
"A. Yes, sir.
"Q. Schlemmer knew that?
"A. Yes, sir; they all knew it.
"Q. And they all disobey it, too, pretty generally?
"A. You hardly ever see anybody with a stick."

Under the Act of Congress of 1893 the absence of automatic couplers does not make the company liable *per se* for damages to the injured party. It subjects the company to fine under the 6th section and the 8th section takes away the defence of the employee's assumption of risk, if the act has been violated. Beyond this the question of damages is determined by the rules and principles of law precisely as they existed prior to the passage of that Act. It does not permit an employee to recover damages for an injury which, as in this case, his obedience of orders would have rendered impossible.

The Steam Shovel was not a "Car Used in Moving Interstate Traffic."

The Act of 1893, in its 4th section, makes it unlawful for a railroad company "to haul, or permit to be hauled, or used upon its lines *any car used in moving interstate traffic* not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The supplementary Act of March 2, 1903, (37 Stat. L. 943), declares that "the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons and draw bars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce."

The accident which resulted in the death of plaintiff's decedent occurred before the Act of 1903 was passed, and, as is conceded, only five days after the date on which the Act of 1893 had gone into effect under extensions granted by the Interstate Commerce Commission, pursuant to authority contained in the 7th section of the act.

The Act of 1903 is, however, evidence that Congress did not understand the Act of 1893 to apply to every kind of vehicle that may be used on a railroad. Otherwise it would not have been deemed necessary to extend and amplify its terms and apply its provisions not only "to any car used in moving interstate traffic," but also to "all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce."

The question is not whether the steam shovel in question comes under the designation of "similar vehicles used on any railroad engaged in interstate commerce," under the Act of 1903, but whether it was a *"car used in moving interstate traffic,"* within the intendment of the Act of 1893.

The language of a statute is always construed in accordance with common parlance. In common parlance the machine in question is never spoken of as a car at all, but always as a "shovel" or a "steam shovel." Throughout this case plaintiff's counsel have been very careful to designate it as a "steam shovel *car*." It never was so designated or spoken of by anybody else either in the record of this case or anywhere else. Twenty-eight times the witnesses, railroad men, have designated it as a "steam shovel" (Record, pp. 15-

20-21-22-25-33-36-37-39-43-46-49). Never once did any of them designate it as anything else, except when the words were put into their mouths by plaintiff's counsel. Such a machine is not known to the trade or to the railroad fraternity as a "steam shovel car" any more than a mowing machine is known as a "mowing machine wagon," or a reaper as a "reaper wagon" or "reaper car."

The following occurs in the testimony of Yard Conductor Coates, who was plaintiff's first witness (Record, p. 21):

"Q. This steam shovel you speak of is a mere machine used in excavating?
"A. Yes, sir.
"Q. A machine on wheels; it is not a car at all, as I understand it. It was merely a machine used in excavating, on wheels. Is that right, Mr. Coates?
"A. Yes, sir, that is right."

In the testimony of witness Nielson, a freight conductor, the following occurs (p. 39):

"Q. What was on the rear of your train?
"A. The steam shovel.
"Q. Will you describe that steam shovel to the court and jury?
"A. Well, it was an ordinary steam shovel, is about all I know about it.
"Q. A truck under it?
"A. Yes, sir.
"Q. And was used for what purpose?
"A. Used for contractors at the time.
"Q. In making railroad?
"A. Railroad building.
"Q. To shovel dirt?
"A. Yes, sir.
"Q. A big shovel operated by steam?
"A Yes, sir."

It was used "'in the construction of railways" and belonged to the "Construction Company" (pp. 50-51).

Just as a mowing machine or a reaper requires wheels to enable it to get at the hay or the grain that is to be cut, so a steam shovel requires wheels to admit of its approach to a bank of earth which is to be shoveled. Three of these machines, each one marked "Marion Shovel, Model No. 60," are, or were on the 15th of November, 1906, at work in a long and deep cut between Washington and Alexandria. They contain powerful machinery by which a huge shovel is by the power of steam drawn, or forced, into a bank of earth, taking up a ton or more at a single dip. It is then swung by a heavy crane out over an empty dirt car. By the pressure of a button, or touch of a lever, the bottom of the shovel gives way and its contents drop into the car. Two shovelfuls, taken out in two minutes, fill a car. As the work progresses additional rails are laid so that the shovel may, by the assistance of its wheels, reach its work precisely as the mowing machine, by means of its wheels, reaches the grass it is to cut. A steam shovel is no more a car than a mowing machine is a wagon. But if it could be deemed a car at all, it is certainly not one "used in moving interstate traffic." It is not used in moving traffic at all, but in shoveling dirt, making the excavations necessary in the construction of a railroad.

This particular steam shovel, instead of being used in moving interstate traffic, or any kind of traffic, was itself the subject of transportation by the defendant company. It did not belong to the railroad company. Plaintiff's statement (Record, p. 4) charges that "defendant was transporting said shovel car from Limestone, in the State of New York, through the State of Pennsylvania." It was being transported for the construction company which owned it. Instead of using it in moving traffic, the railroad company was transporting it as an article of traffic and receiving pay for its transportation. Such a steam shovel is very heavy.

It could not safely be loaded into, or onto, any ordinary freight car. It was therefore easier and safer to hitch it to the rear end of a freight train. But it was nevertheless an object of transportation—an article of freight traffic—and not something used in moving traffic.

Suppose, instead of a steam shovel, it had been a mowing machine, offered for transportation, and its wheels having been found to fit the rails, it had been attached to the rear of the train, would it thereby have become a "car used in moving interstate traffic?"

Whether or not such a steam shovel can be deemed within the provisions of the statute of 1903, covering all "cars and similar vehicles used on any railroad engaged in interstate traffic," it seems plain that it was not "a car used in moving interstate traffic," within the terms and intendment of the Act of 1893.

Furthermore, there is no satisfactory or conclusive evidence that the steam shovel itself was in course of transportation from a point in one state to a point in another. The testimony shows that it was being taken from DuBois to Punxsutawney (Record, pp. 15, 28, 32, 33, 39).

"I do not remember where it came from. We was to take it from DuBois to Punxsutawney" (Record, p. 43).

Those points are both within the State of Pennsylvania. The only witness that testified about any other point was Mr. McCray, who said:

"I learned from railroad men that it was coming from Limestone. * * * * * This I know from hearsay" (Record, p. 50).

It is conceded that the Act of 1893 did not go into effect until August 1, 1900, extensions having been granted by the Interstate Commerce Commission under the 7th sec-

tion. If this steam shovel did come from Limestone at all, there is no evidence whether it was taken upon the defendant's railroad before, or after August 1, 1900.

In conclusion, defendant in error respectfully submits that the writ of error in this case should be dismissed, and the judgment of the Supreme Court of Pennsylvania affirmed, for the following reasons:

1. No Federal question was submitted to, or passed upon by, the Supreme Court of Pennsylvania.

2. Even had a Federal question been raised by the record in the Supreme Court of Pennsylvania, its decision would not have been necessary, in view of the ruling upon the question of contributory negligence.

3. The decision of the State courts on the question of contributory negligence is not reviewable here.

4. The Act of Congress of 1893 does not deprive a common carrier of the defence of contributory negligence, but relates only to the defence of assumption of risk.

5. In any event, the steam shovel in question was not "a car used in moving interstate traffic," but was itself being moved as traffic, although whether as interstate traffic, does not clearly appear, from the evidence.

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Supreme Court of the United States.

No. 41.—October Term, 1906.

Catherine Schlemmer, Plaintiff in Error,
vs.
The Buffalo, Rochester and Pittsburg Railway Company.
} In Error to the Supreme Court of the State of Pennsylvania.

[March 4, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action for the death of the plaintiff's intestate, Adam M. Schlemmer, while trying to couple a shovel car to a caboose. A nonsuit was directed at the trial and the direction was sustained by the Supreme Court of the State. The shovel car was part of a train on its way through Pennsylvania from a point in New York, and was not equipped with an automatic coupler in accordance with the Act of March 2, 1893, c. 196, § 2, 27 Stat. 531. Instead of such a coupler it had an iron drawbar fastened underneath the car by a pin and projecting about a foot beyond the car. This drawbar weighed about eighty pounds and its free end played up and down. On this end was an eye, and the coup ling had to be done by lifting the free end, possibly a foot, so that it should enter a slot in an automatic coupler on the caboose and allow a pin to drop through the eye. Owing to the absence of buffers on the shovel car and to its being so high that it would pass over those on the caboose, the car and caboose would crush any one between them if they came together and the coupling failed to be made. Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose. To do so he had to get between the cars, keeping below the level of the bottom of the shovel car. It was dusk and in endeavoring to obey the order and to guide the drawbar he rose a very little too high, and, as he failed to hit the slot, the top of his head was crushed.

The plaintiff in her declaration alleged that the defendant was transporting the shovel car from State to State and that the coupler was not such as was required by existing laws. At the trial special attention was called to the United States statute as part of the plaintiff's case. The Court having directed a nonsuit with leave to the plaintiff to move to take it off, a motion was made on the ground, among others, "that under the United States statute, specially pleaded in this case, the decedent was not deemed to have assumed the risk owing to the fact that the car was

not equipped with an automatic coupler." The question thus raised was dealt with by the Court in overruling the motion. Exceptions were allowed and an appeal taken. Among the errors assigned was one "in holding that the shovel car was not a car used in interstate commerce or any other kind of traffic," the words of the Court below. The Supreme Court affirmed the judgment in words that we shall quote. We are of opinion that the plaintiff's rights were saved and that we have jurisdiction of the case, subject to certain matters that we shall discuss.

On the merits there are two lesser questions to be disposed of before we come to the main one. A doubt is suggested whether the shovel car was in course of transportation between points in different States, and also an argument is made that it was not a car within the contemplation of § 2. On the former matter there seems to have been no dispute below. The trial court states the fact as shown by the evidence, and testimony that the car was coming from Limestone, New York, is set forth, which, although based on the report of others, was evidence, at least unless objected to as hearsay. *Damon* v. *Carrol*, 163 Mass. 404, 408, 409. It was the testimony of the defendant's special agent employed to investigate the matter.

The latter question is pretty nearly answered by *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 16. As there observed, "Tested by context, subject matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives." "The object was to protect the lives and limbs of railroad employés by rendering it unnecessary for a man operating the couplers to go between the ends of the cars." These considerations apply to shovel cars as well as to locomotives, and show that the words "used in moving interstate traffic" should not be taken in a narrow sense. The later act of March 2, 1903, c. 976, 37 Stat. 943, enacting that the provision shall be held to apply to all cars and similar vehicles, may be used as an argument on either side, but in our opinion indicates the intent of the original Act. 196 U. S. 21. There was an error on this point in the decision below.

A faint suggestion was made that the proviso in § 6 of the Act, that nothing in it shall apply to trains composed of four-wheel cars, was not negatived by the plaintiff. The fair inference from the evidence is that this was an unusually large car of the ordinary pattern. But, further, if the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. The word 'provided' is used in our legislation for many other purposes beside that of expressing a condition. The only condition expressed by this clause is that four-wheeled cars shall be excepted from the requirements of the Act. In substance it merely creates an exception, which has been said to be the general purpose of such clauses. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37.

"The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it," &c. *Ryan* v. *Carter*, 93 U. S. 78, 83. *United States* v. *Dixon*, 15 Peters, 141, 165. The rule applied to construction is applied equally to the burden of proof in a case like this. *United States* v. *Cook*, 17 Wall. 168. *Commonwealth* v. *Hart*, 11 Cush. 130, 134.

We come now to the main question. The opinion of the Supreme Court was as follows: "Whether the Act of Congress . . . has any applicability at all in actions for negligence in the Courts of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject." It is said that the existence of contributory negligence is not a Federal question and that as the decision went off on that ground there is nothing open to revision here.

We certainly do not mean to qualify or limit the rule that, for this Court to entertain jurisdiction of a writ of error to a State Court, it must appear affirmatively that the State Court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. *Bachtel* v. *Wilson*, Jan. 7, 1907. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254. And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & Indianapolis Railroad Co.* v. *Indiana*, 194 U. S. 579. The application of this rather vague principle will appear as we proceed.

It is enacted by § 8 of the Act that any employé injured by any car in use contrary to the provisions of the Act, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase assumption of risk was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of *Farwell* v. *Boston & Worcester R. R. Co.*, 4 Met. 49, 57, 58. But, at the present time, the notion is not confined to risks of

such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like § 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.

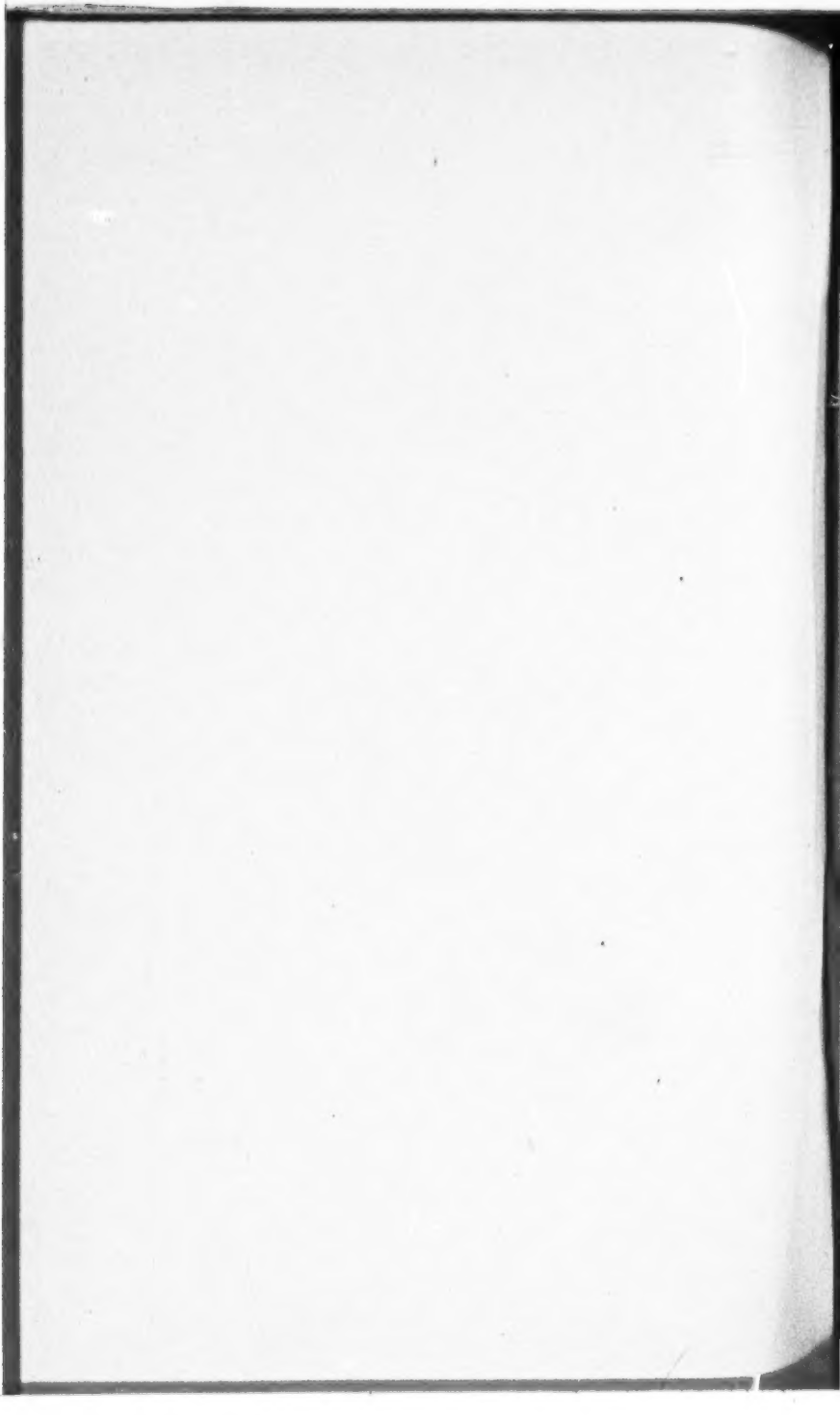
Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, Oklahoma & Gulf R. R. Co.* v. *McDade*, 191 U. S. 64, 68. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defence of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. *Patterson* v. *Pittsburg & Connellsville R. R. Co.*, 76 Penn. St. 389. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound.

To recur for a moment to the facts, the only ground, if any, on which Schlemmer could be charged with negligence is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between

the rails and under the shovel car as he did, and his orders contemplated that he should do so. But the opinion of the trial judge, to which, as has been seen, the Supreme Court refers, did not put the decision on the fact of warning alone. On the contrary, it began with a statement that an employé takes the risk even of unusual dangers if he has notice of them and voluntarily exposes himself to them. Then it went on to say that the deceased attempted to make the coupling with a full knowledge of the danger, and to imply that the defendant was guilty of no negligence in using the arrangement which it used. It then decided in terms that the shovel car was not a car within the meaning of § 2. Only after these preliminaries did it say that, were the law otherwise, the deceased was guilty of contributory negligence; leaving it somewhat uncertain what the negligence was.

It seems to us not extravagant to say that the final ruling was so implicated with the earlier errors that on that ground alone the judgment should not be allowed to stand. We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the Court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local Courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed.

Judgment reversed.



Supreme Court of the United States.

No. 41.—October Term, 1906.

Catherine Schlemmer, Plaintiff in Error, vs. The Buffalo, Rochester and Pittsburg Railway Company. } In error to the Supreme Court of the State of Pennsylvania.

[February 25, 1907.]

Mr. Justice Brewer, dissenting.

I dissent from the opinion and judgment in this case and for these reasons:

This was an action in the Common Pleas Court of Jefferson County, Pennsylvania, to recover damages on account of the death of the husband of plaintiff. On the trial the court ordered a non-suit on the ground of contributory negligence on the part of the decedent, with leave to the plaintiff to move to take the same off. This motion was made and overruled; judgment for the defendant was entered, which was affirmed by the Supreme Court of the State. The decedent was killed while attempting to couple a steam shovel to a caboose. The steam shovel was being moved in interstate transportation and was not equipped with the safety coupler required by act of Congress of March 2, 1893. 27 Stat. 531. The eighth section of that act provides:

"That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

This, while removing from the employe the burden of any assumption of risk, does not relieve him from liability for contributory negligence. For the rule is well settled that while, in cases of this nature, a violation of the statutory obligation of the employer is negligence *per se*, and actionable if injuries are sustained by servants in consequence thereof, there is no setting aside of the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless that statute is so worded as to leave no doubt that this defense is also to be excluded. *Taylor* v. *Carew Manufacturing Company*, 143 Mass. 470; *Krause* v. *Morgan*, 53 Ohio St. 26; *East Tennessee etc. Railroad Company* v. *Rush*, 15 Lea (Tenn.) 145, 150; *Queen* v. *Dayton Coal etc. Company*, 95 Tenn. 458; *Reynolds* v. *Hindman*, 32 Iowa, 146; *Caswell* v. *Worth*,

85 E. C. L. 849; *Buckner* v. *Richmond etc. Railroad Company*, 72 Miss. 873; *Victor Coal Company* v. *Muir*, 20 Col. 320; *Holum, Admr. etc.* v. *Chicago etc. Railway Company*, 80 Wis. 299; *Kilpatrick* v. *Grand Trunk Railway*, 74 Vt. 288; *Denver & R. G. Railroad Company* v. *Arrighi*, 129 Fed. Rep. 347; *Winkler* v. *Philadelphia etc. Railroad Company*, 4 Pennewill's Del. Rep. 80. The Interstate Commerce Commission held this to be the rule in reference to this particular statute. 14 Ann. Rep. 1900, p. 84. Indeed it is not contended by the majority that the defense of contributory negligence has been taken away.

That there is a vital difference between assumption of risk and contributory negligence is clear. As said by this court in *Choctaw, Oklahoma etc. Railroad Company* v. *McDade*, 191 U. S. 64, 68: "The question of assumption of risk is quite apart from that of contributory negligence." See also *Union Pacific Railway Co.* v. *O'Brien*, 161 U. S. 451, 456. This proposition, however, is so familiar and elementary that citation of authorities is superfluous.

In the motion for a nonsuit the second proposition was that "the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel—that this omission was the fault of the deceased exclusively—and that deceased was guilty of contributory negligence and there can be no recovery in this case."

In ordering the nonsuit the trial court said:

"True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employe to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

* * * * * *

"It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover."

The Supreme Court affirmed the judgment in the following *per curiam* opinion:

"Whether the act of Congress in regard to the use of automatic couplings on cars employed in interstate commerce has any applicability at all in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence, and the judgment is affirmed on his opinion on that subject."

That contributory negligence is a non-Federal question is not doubted, and that when a State court decides a case upon grounds which are non-Federal and sufficient to sustain the decision this court has no jurisdiction is conceded.

While sometimes negligence is a mixed question of law and fact, yet in the present case, whether the decedent in attempting to make the coupling, after the warning given by the conductor, lifted his head unnecessarily and negligently, is solely a question of fact, and in cases coming on error from the judgment of a State court the findings of that court on questions of fact have always been held conclusive on us. See *Chrisman* v. *Miller*, 197 U. S. 313, 319, and the many cases cited in the opinion.

It would seem from this brief statement that the case ought to be dismissed for lack of jurisdiction. Escape from this conclusion can only be accomplished in one of these ways: By investigation of the testimony and holding that there was no proof of contributory negligence. If the case came from one of the lower Federal courts we might properly consider whether there was sufficient evidence of contributory negligence; but, as shown above, a very different rule obtains in respect to cases coming from a State court. We said this very term, in *Bachtel* v. *Wilson*, 204 U. S. 36, 40, in reference to a case coming from a State court to this: "Before we can pronounce this judgment in conflict with the Federal Constitution it must be made to appear that this decision was one necessarily in conflict therewith, and not that possibly or even probably it was." Before then we can disturb this judgment of the Supreme Court of Pennsylvania it must (paraphrasing the language just quoted a little) be made to appear that its decision of the question of contributory negligence was one necessarily in disregard of the testimony and not that possibly or even probably it was.

It cannot be said that there was no evidence of negligence on the part of the decedent. The plaintiff's testimony (and the defendant offered none) showed that deceased was an experienced brakeman; that the link and pin coupling was in constant use on other than passenger coaches; that before the deceased went under the car the pin had already been set; that as he was going under the car he was twice notified to be careful and keep his head down, and yet, without any necessity therefor being shown, he lifted his head and it was crushed between the two cars; that all he had to do was to guide the free end of the drawbar into the slot, and while the drawbar weighed seventy-five to eighty pounds, it was fastened at one end, and the lifting and guiding was only of the other and loose end; that the drawheads were of the standard height and the body of the shovel car higher than that of the caboose. Immediately thereafter the coupling was made by another brakeman without difficulty. If an iron is dangerously hot, and one knows that it is hot and is warned not to touch it, and does

touch it without any necessity therefor being shown, and is thereby burned, it is trifling to say that there is no evidence of negligence.

A second alternative is that this court finds that the Supreme Court of Pennsylvania recognizes no difference between assumption of risk and contributory negligence. But that is not to be imputed in view of the rulings in the lower court, affirmed by the Supreme Court, to say nothing of the recognized standing and ability of that court.

Or we may hold that the Pennsylvania courts intentionally, wrongfully and without any evidence thereof found that there was contributory negligence in order to avoid the binding force of the Federal law. During the course of the argument, in response to an interrogation, counsel for plaintiff in error bluntly charged that upon those courts. Of course this court always speaks in respectful terms of the decisions it reviews, but the implication of the most courteous language may be as certain as a direct charge.

It is intimated that the Pennsylvania courts confuse assumption of risk and contributory negligence—in other words, are unmindful of the difference between them, and *Patterson* v. *Pittsburg etc. Railroad Company*, 76 Pa. St. 389, is cited as authority. That case was decided more than thirty years ago, and might, therefore, fairly be considered not an expression of the present views of those courts. But on examination of the case, in which a judgment in favor of the railroad was reversed by the Supreme Court, we find this language which is supposed to indicate the confusion (pp. 393, 394):

"In this discussion, however, we are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service, is so obviously and immediately dangerous, that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled. But where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

Curiously enough in *Narramore* v. *Cleveland etc. Railway Company*, 37 C. C. A. 499, 505, a recent decision of the Court of Appeals of the Sixth Circuit, in the opinion announced by Circuit Judge Taft is language not altogether dissimilar:

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit

of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it."

For these reasons I dissent from the opinion and judgment, and am authorized to say that Mr. Justice PECKHAM, Mr. Justice MCKENNA and Mr. Justice DAY concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.